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Supreme Court of the United States

HUNTLEIGH USA CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals for the Federal Circuit erred in holding that Petitioner was not entitled, as a matter of law, to "just compensation" for a "taking" of its property pursuant to the Fifth Amendment where the Aviation and Transportation Security Act, enacted by Congress in the wake of the terrorist attacks on the United States on September 11, 2001, (1) nationalized the entire domestic airport passenger and baggage screening industry in which Petitioner had operated for decades; (2) expressly made it illegal for private screening companies, including Petitioner's company, to continue providing these services in the face of a newly mandated governmental monopoly over provision of such services; and (3) provided for the take-over by the government of existing private screening contracts, including Petitioner's contracts, pursuant to which these services were provided.

Whether the Court of Appeals for the Federal Circuit erred in holding that this Court's decision in *Kimball Laundry Co. v United States*, 338 U.S. 1 (1949), precludes compensation under the Fifth Amendment for a "taking" of goodwill and going-concern value, where those property interests have been permanently, rather than temporarily, destroyed by governmental action.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Huntleigh USA Corporation is wholly owned subsidiary of ICTS International N.V., a publicly-held limited liability company whose shares are traded on the NASDAQ.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
A. Background	4
B. Proceedings Below	7
1. Pretrial Opinions	7
2. Trial Court Judgment	10
3. Federal Circuit Decision	11

Contents

	Page
REASONS FOR GRANTING THE PETITION	13
A. The Decision Below Conflicts With This Court's Takings Jurisprudence	15
1. The Federal Circuit's Restrictive Application of *Omnia* Contravenes The Reasoning Of That Case and The Court's Subsequent Takings Decisions	16
2. The Federal Circuit's Assault on the Fifth Amendment Mistakenly Limits This Court's Decision in *Kimball Laundry*	19
B. The Decision Below Creates an Intra-Circuit Conflict in the Federal Circuit Having Exclusive Jurisdiction Over Similar Claims, Thus Necessitating This Court's Review Without Further Percolation in the Federal Courts of Appeal	21
C. The Issue Presented By This Case Is Important, Recurring, and Has Far-Reaching Ramifications	26
CONCLUSION	29

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Federal Circuit Dated May 15, 2008 ..... 1a

Appendix B — Opinion Of The United States Court Of Federal Claims Dated March 15, 2007 ..... 30a

Appendix C — Denial Of Motion For Summary Judgment And Order Dated October 12, 2006 ..... 47a

Appendix D — Opinion Of The United States Court Of Federal Claims Dated April 21, 2005 ..... 50a

Appendix E — Opinion Of The United States Court Of Federal Claims Dated January 7, 2005 ..... 57a

Appendix F — Aviation And Transportation Security Act 86a

TABLE OF CITED AUTHORITIES

Page

CASES

Air Pegasus of D.C., Inc. v. United States,
424 F.3d 1206 (Fed Cir. 2005) 12, 18, 19

Armstrong v. United States,
364 U.S. 40 (1960) 16, 17

Cardinal Chem. Co. v. Morton Int'l Inc.,
508 U.S. 83 (1993) 15, 22

Cienega Gardens v. United States,
331 F.3d 1319 (Fed. Cir 2003) ..... *passim*

Cienega Gardens v. United States,
503 F.3d 1266 (Fed. Cir. 2007) 24

Eastern Enters. v. Apfel,
524 U.S. 498 (1998) 27

Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.,
535 U.S. 722 (2002) 16, 22

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.,
482 U.S. 304 (1987) 21

Cited Authorities

Page

Goldblatt v. Hempstead,
369 U.S. 590 (1962) 17

Huntleigh USA Corp. v. United States,
63 Fed. Cl. 440 (2005) 8

Huntleigh USA Corp. v. United States,
65 Fed. Cl. 178 (2005) 9

Huntleigh USA Corp. v. United States,
75 Fed. Cl. 642 (2007) 10-11

Huntleigh USA Corp. v. United States,
525 F.3d 1370 (Fed. Cir. 2008) ..... *passim*

KSR Int'l. Co. v. Teleflex Inc.,
127 S. Ct. 1727 (2007) 15

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 27

Kimball Laundry Co. v United States,
338 U.S. 1 (1949) ..... *passim*

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) ..... *passim*

Maritrans Inc. v. United States,
342 F.3d 1344 (Fed. Cir. 2003) 21

Omnia Commercial Co. v. United States,
261 U.S. 502 (1923) ..... *passim*

Cited Authorities

Page

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 24

Penn Cent. Tran. Co. v. City of New York,
438 U.S. 104 (1978) ..... *passim*

Ruckelshous v. Monsanto Co.,
467 U.S. 986 (1984) 27

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002) 24

Warner-Jenkinson Co. v. Hilton Davis Chem. Co.,
520 U.S. 17 (1997) 22

STATUTES AND CONSTITUTIONAL PROVISION

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1295(a)(3) 13, 21

28 U.S.C. § 1491(a)(1) 13, 21

49 U.S.C. § 114 5

49 U.S.C. § 44901 *et seq.* (2000) 4

Cited Authorities

Page

Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) ... *passim*

U.S. Const. amend. V. ..... *passim*

REGULATIONS

14 C.F.R. pts 107-08 (2000) (superseded) 4

OTHER MATERIALS

Andrew E. Kramer, *In Dispute with BP, Kremlin's Hand is Seen*, NY Times, July 19, 2008 28

Simon Romero, *Chavez Seizes Greater Economic Power*, NY Times, May 18, 2008 28

Huntleigh USA Corporation ("Petitioner" or "Huntleigh") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (Schall, J., joined by Newman and Mayer, JJ.) affirming judgment for the government, is published at 525 F.3d 1370 (Fed. Cir. 2008), and reprinted in the Petitioner's Appendix ("Pet. App.") at 1a-29a.

The opinion of the Court of Federal Claims (Margolis, J.) granting judgment for the government is reported at 75 Fed. Cl. 642 (2007), and is reprinted in the Pet. App. at 30a-46a. The opinion of the Court of Federal Claims denying the government's motion for summary judgment is unreported and is reprinted at Pet. App. 47a-49a. The opinion of the Court of Federal Claims denying the government's motion for reconsideration is reported at 65 Fed. Cl. 178 (2005), and is reprinted at Pet. App. 50a-56a. The opinion of the Court of Federal Claims denying the government's motion to dismiss the complaint is reported at 63 Fed. Cl. 440 (2005), and is reprinted at Pet. App. 57a-85a.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S Const. amend V.

Pertinent provisions of the Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001), are reprinted in relevant part at Pet. App. 86a-134a.

STATEMENT

This case arises out of the nationalization by the United States Government of the private domestic airport passenger and baggage screening industry, including the business owned by Huntleigh, pursuant to the Aviation and Transportation Security Act ("ATSA" or the "Act"), enacted in the wake of the terrorist attacks on the United States on September 11, 2001. Pub. L. No. 107-71, 115 Stat. 597 (2001) (Pet. App. 86a-134a). By its express terms, the Act was specifically designed to replace, at all domestic airports, private passenger and baggage screening companies like Huntleigh, which had provided screening for decades, with a government monopoly. On its face, the Act mandates that the government exclusively supply all such security screening services and expressly prohibits private companies like Huntleigh from doing so. *See* ATSA § 101(g)(1), 115 Stat. at 603 (Pet. App. 105a-106a); § 110(b)(2), 115 Stat. at 614-615 (Pet. App. 111a-112a). As provided for in the Act, Huntleigh's contracts, pursuant to which it provided screening services, were

nullified when the Government stepped in to take over provision of these services. *See* ATSA § 101(g)(2)-(3), 115 Stat. at 603-604 (Pet. App. 106a-107a).

The direct and intended impact of the Act on Huntleigh was to transfer its longstanding security screening business to a newly created government agency called the Transportation Security Administration ("TSA"). Huntleigh's contracts, goodwill and going-concern value, which the Federal Circuit below acknowledged were cognizable property interests, were completely nullified, and it was precluded from performing under its existing contracts or entering into new contracts for the provision of passenger and baggage screening. Even though the intended purpose and effect of the Act was to preclude private screening companies like Huntleigh from continuing to perform screening services and to replace them with a federal monopoly, the Federal Circuit, which has exclusive jurisdiction over Fifth Amendment takings claims brought against the federal government, misconstrued this Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), to hold that Huntleigh's loss was merely "indirect" and did not constitute a compensable "taking." This erroneous decision directly conflicts with the relevant case law of this Court, creates a conflict within the Federal Circuit, and threatens to eviscerate the basic constitutional protection of property rights. Accordingly, this Petition presents an issue of fundamental importance about the government's power to seize private property without paying "just compensation" as constitutionally mandated.

A. Background

Before 2001, airlines were required to establish specific air transportation security programs to ensure the safety of airline passengers, which included the provision of screening passengers and property prior to their boarding on to an air craft. *See* 49 U.S.C. § 44901 *et seq.* (2000), *amended by* ATSA, Pub. L. No. 107-71 (2001) (Pet. App. 86a-134a); 14 C.F.R. pts. 107, 108 (2000) (superseded). Virtually without exception, individual air carriers discharged their passenger and baggage screening responsibilities by contracting with private airline security specialists like Huntleigh. Huntleigh furnished screening services pursuant to long-standing and continuously renewed contracts, and had an excellent reputation in the screening industry. These contracts were rarely, if ever, terminated, and indeed no major airline had terminated a Huntleigh contract since 1991.

The tragic events of September 11, 2001 focused significant national attention on airport security screening, and the immediate impact on Huntleigh's business was dramatic. In keeping with Federal Aviation Administration recommendations, Huntleigh determined to improve the quality of screening by decreasing turnover rates and attracting employees with the necessary skill level. It also recruited, hired, and trained thousands of new employees to meet the increased screening demands. Huntleigh's actions reflected the prevailing view in the immediate aftermath of the terrorist attacks that screening would continue, as it had for approximately the past thirty years, to be performed by private companies providing screening on

behalf of air carriers but pursuant to heightened standards and screening requirements.

Within a few months, on November 19, 2001, Congress enacted ATSA, which created the TSA, 49 U.S.C. § 114, and directed that "[n]ot later than 3 months" after its enactment, "the Under Secretary of Transportation for Security shall assume civil aviation security functions and responsibilities." ATSA § 101(g)(1), 115 Stat. at 603 (Pet. App. 105a). On its face, the Act made it *illegal* for private companies to perform these services, requiring instead that "[t]he Under Secretary of Transportation for Security shall provide for the screening of all passengers and property . . ." and that *"[a]ll screening of passengers and property at airports in the United States . . . shall be supervised by uniformed Federal personnel of the Transportation Security Administration . . ."* ATSA § 110(b)(2), 115 Stat. at 614-615 (Pet. App. 111a-112a) (emphasis added).

Recognizing that this mandate was inconsistent with existing private screening contracts, ATSA referred, in a section describing the transition from private to public security screening, specifically to the Act's impact on "*air carrier or foreign air carrier contract[s] for provision of passenger screening services* at airports in the United States" and "any *contract* the air carrier has entered into with respect to carrying out" a screening or security function. *See* ATSA § 101(g)(2)-(3), 115 Stat. at 603-604 (Pet. App. 106a) (emphasis added). In light of the understood direct effect on screening contracts, the Act further provided that in certain circumstances, "adequate compensation" be paid to the parties to those contracts. ATSA § 101(g)(2),

115 Stat. at 603-604 (Pet. App. 106a). Internal government memoranda, as well as the government's trial witnesses, confirmed that the Act required the take-over of private screening contracts.

ATSA also required the airlines to continue paying for screening services, mandating that the money be paid to the government. Section 118 of ATSA instructs the TSA to levy fees on both passengers and airlines to pay the government's costs for furnishing screening services. *See* 115 Stat at 625 (Pet. App. 127a-129a). Finally, ATSA did not decrease or eliminate the requirements for screening; it increased them by imposing more extensive screening requirements, including screening one hundred percent of checked baggage, heightened passenger screening requirements, and enhanced prerequisites, training, and supervision for screening personnel. *See* ATSA § 109, 115 Stat. at 613 (Pet. App. 108a-110a); ATSA § 110, 115 Stat. at 614 (Pet. App. 111a-115a); ATSA § 111, 115 Stat. at 616-619 (Pet. App. 117a-125a).

Once Congress enacted ATSA, Huntleigh's private screening contracts were nullified. Beginning February 17, 2002, to implement ATSA, the TSA entered into interim contracts with Huntleigh and other private companies, pursuant to which the companies temporarily provided screening services on behalf of the government. Shortly thereafter, during the summer and fall of 2002, the government unilaterally removed Huntleigh's screeners from security checkpoints and replaced them with TSA employees. By November 2002, the government had fully implemented its nation-wide screening monopoly, and every checkpoint for which

Huntleigh had a contract to provide screening services was staffed by federal employees, many of whom had been formerly employed by Huntleigh.

As a direct result of ATSA, Huntleigh's valuable screening business was assumed by the government, its employees were hired by the government, its long-standing contracts were nullified, and it was legally precluded from performing passenger and baggage screening at all domestic airports in this country. Those very same passenger and baggage screening functions are now being operated by the TSA – at the same check points, at the same airports, for the same air carriers, and in many instances by Huntleigh's former employees, now wearing TSA uniforms.

B. Proceedings Below

1. Pretrial Opinions

On November 14, 2003, Huntleigh initiated this action against the United States in the Court of Federal Claims. (*See* Pet. App. 61a.) Huntleigh alleged that when the government enacted ATSA, it appropriated Huntleigh's valuable business assets, including its contracts, goodwill and going-concern value, without compensating Huntleigh. Based on those allegations, Huntleigh asserted two causes of action, a takings claim under the Fifth Amendment of the United States Constitution, and a statutory claim under section 101(g) of ATSA, which requires the government to pay "adequate compensation" in the event it assumes "the rights and responsibilities" of a "contract for provision of passenger screening services." ATSA § 101(g)(2), 115

Stat. at 603-04 (Pet. App. 106a). Huntleigh is not seeking review of the dismissal of that statutory claim.

On March 24, 2004, the United States moved to dismiss Huntleigh's Complaint pursuant to Rule 12(b)(6) of the Court of Federal Claims. By opinion and order dated January 7, 2005, the Court of Federal Claims rejected all of the government's legal arguments and denied the motion to dismiss. (See Pet App. 57a (*Huntleigh USA Corp. v. United States*, 63 Fed. Cl. 440 (2005)).) Addressing the existence of property rights, the Court of Federal Claims held that "business assets," including "contracts, goodwill, and going-concern value" plainly are compensable "property" under controlling Supreme Court and Federal Circuit precedent. (Pet. App. 65a.)

The court also decisively rejected the government's argument that Huntleigh's loss of its business assets was "merely consequential" under *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), and its progeny. (*See* Pet. App. 68a-69a.) The court explained that "[r]ather than merely bringing the contract between Huntleigh and the airlines to an end, as the government suggests, the government has appropriated Huntleigh's rights under the contract. The government has gone beyond merely taking over the subject matter of the contract, as was the case in *Omnia*." (Pet. App. 74a.) Thus, the court determined that the case was controlled by the Federal Circuit's opinion in *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir 2003), and held:

> The present case is even more egregious. More than rewriting the contracts between

> Huntleigh and the nation's airlines, the government has taken over Huntleigh's position as the contractor, and has created for itself a sweeping monopoly over the entire industry.

(Pet. App. 73a-74a.)

Having established that Huntleigh had alleged it possessed valid property rights compensable under the Takings Clause, the trial court then determined that Huntleigh had properly alleged a "taking" under the three-factor analysis set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). (Pet. App. 75a.) The government's subsequent motion for reconsideration was denied, on the grounds that the government had "present[ed] no new facts []or arguments" in its reconsideration motion. (*See* Pet. App. 52a, 56a (*Huntleigh USA Corp. v. United States*, 65 Fed. Cl. 178 (2005)).)

Following the close of fact and expert discovery, the government filed a motion for summary judgment. The Court of Federal Claims denied the government's motion from the bench, once again rejecting the legal and factual arguments advanced by the government:

> Many of the legal and factual issues raised in Defendant's motion for summary judgment were considered in this Court's previous denial of Defendant's motion to dismiss[, 63 Fed. Cl. 440,] . . . and the motion to reconsider[, 65 Fed. Cl. 178] . . . .

> Defendant again raises many of the same issues in the present motion. For the same reasons previously stated in response to Defendant's motions as to those issues, the motion for summary judgment is denied.

(Pet. App. 47a-48a (Transcript and Order denying Defendant's Motion for Summary Judgment, October 12, 2006).)

2. Trial Court Judgment

On November 13, 2006, the case proceeded to a bench trial which lasted four days. Huntleigh presented extensive evidence of the direct and devastating impact of ATSA on its screening contracts, which were nullified as a result of the Act. (Pet. App. 6a-7a, 33a.) A once thriving business at the forefront of its industry (*id.*), ATSA prohibited Huntleigh from continuing performance under its screening contracts. (Pet. App. 32a ("The Act required virtually all passenger and baggage screening to be conducted by federal employees within one year.").) There was no evidence presented to support any contention that ATSA merely decreased the need for Huntleigh's services. To the contrary, the Act legally *precluded* Huntleigh from offering competing security screening services anywhere in the country. (*Id.*) At the end of December 2006, the parties filed post-trial briefs. The court heard final arguments on February 28, 2007.

On March 15, 2007, the Court of Federal Claims issued its final opinion in this case. (*See* Pet. App. 30a (*Huntleigh USA Corp. v. United States*, 75 Fed. Cl. 642

(2007)).) In an abrupt and total reversal of its three prior decisions, the court concluded that "the property Huntleigh described in its evidence at trial [its contracts, goodwill or going-concern value] is not subject to compensation under the Fifth Amendment." (Pet. App. 35a.) The opinion appeared to contain no analysis of whether a taking had occurred, and the court did not address what compensation might be due. Although the court suggested that the "evidence presented at trial" contributed to its about-face on the existence of legal property rights (Pet. App. 35a), the Court of Federal Claims included only two short paragraphs reciting the "Facts" (Pet. App. 32a-33a), and instead adopted purely legal positions that it had itself previously and decisively rejected on three separate occasions. The trial court jettisoned its own prior determination that Huntleigh's claim was not "merely consequential" under *Omnia*, and inexplicably held that the government's action had rendered Huntleigh's private screening contracts "impossible to perform" which "does not amount to a taking." (Pet. App. 37a.) The court concluded: "In summary, Huntleigh did not possess a compensable property interest under the Fifth Amendment, and the Court's analysis ends there." (Pet. App. 39a.)

3. Federal Circuit Decision

On July 16, 2007, Huntleigh filed its appeal in the Federal Circuit, and on May 15, 2008, the Federal Circuit issued its opinion. (Pet. App. 1a (*Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008)).) The Federal Circuit rejected the lower court's conclusion that Huntleigh had no property interest, holding that "it is undisputed that the property interests Huntleigh alleges were taken are, for purposes of the Fifth Amendment, cognizable property interests." (Pet. App. 13a.)

Rather than proceeding to apply the "takings tests" set forth by this Court in *Penn Central*, 438 U.S. at 104 and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), however, the Federal Circuit simply concluded that Huntleigh had not proven a compensable Fifth Amendment claim as a matter of law. The court found that because the government "did not actually assume [Huntleigh's] contracts" (*i.e.*, sign its name where Huntleigh's name previously had been), Huntleigh's takings claim could not be based on an actual taking of its contracts, but rather must be based on the argument that ATSA rendered those contracts, and the associated goodwill and going-concern value, "worthless." (Pet. App. 16a.) Without any analysis of whether those contracts had in fact been rendered worthless (which they were), the court applied this Court's ruling in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), and its own decision in *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed Cir. 2005), to legally foreclose Huntleigh's takings claim. (Pet. App. 17a-21a.)

The Federal Circuit determined that the imposition of ATSA was "indistinguishable" from the regulatory circumstances in *Omnia* and *Air Pegasus*. (Pet. App. 21a.) It concluded that ATSA did not "take action with respect to any security screening contract to which Huntleigh was a party," and instead merely "reduced the demand for Huntleigh's services." (Pet. App. 20a-21a.) The court did not address ATSA's explicit language that it is directed at air carrier contracts for provision of screening services (which indisputably include Huntleigh's former contracts), ATSA § 101(g)(2)-(3), 115 Stat. at 603-604 (Pet. App. 106a), or ATSA's legislative

preclusion of private screening companies (such as Huntleigh) from providing screening services, ATSA §§ 101(g)(1), 115 Stat. at 603 (Pet. App. 105a-106a); § 110(b)(2), 115 Stat. at 614-615 (Pet. App. 111a-112a). The Federal Circuit determined that Huntleigh's claim that the government had arrogated it's entire screening business, including its contract rights, which were rendered "worthless," did not constitute a compensable taking.

Finally, the Federal Circuit distinguished this Court's analysis in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), concluding that goodwill and going-concern value are only compensable in the context of a temporary, not permanent, taking. (Pet. App. 24a.)

REASONS FOR GRANTING THE PETITION

Review by this Court of the Federal Circuit decision is necessary and important to re-align the Federal Circuit's jurisprudence with that of this Court, harmonize conflicting decisions within the Federal Circuit on this issue, and to ensure that the government is not given a green light to enact legislation the ultimate effect – and avowed purpose – of which is the seizure of private property without awarding constitutionally mandated compensation. It is especially important for this Court to review this incorrect decision because the Federal Circuit has exclusive jurisdiction over takings claims against the United States (28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1295(a)(3)), and the erroneous holding of the Federal Circuit with regard to such claims can only be rectified by this Court's intervention.

The Federal Circuit's opinion misconstrues this Court's decision in *Omnia*, 261 U.S. at 502, to deny Fifth Amendment protection to Petitioner's claim as merely indirect or consequential even where Petitioner's business and contracts were the avowed targets of the regulatory taking, not a remotely impacted incident of the "taking" of someone else's property. To reach its result, the Federal Circuit circumvented this Court's well-established takings jurisprudence and incorrectly extended *Omnia* to a plainly distinguishable factual situation where it was not intended to apply. At the same time, the Federal Circuit fundamentally undermined the Fifth Amendment's protection of private property by denying "just compensation" to claimants who can establish a "taking" by unjustifiably narrowing this Court's holding in *Kimball Laundry*, 338 U.S. at 1.

The decision below also employs discredited legal analysis previously rejected by, and conflicting with, the Federal Circuit's own prior case law. Indeed, in reaching its conclusion, the Federal Circuit was constrained to adopt two positions it had previously discarded in *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). Because the Federal Circuit provides the only venue for appellate review on these issues, a conflict within that circuit creates confusion over property rights throughout the country and can only be rectified by this Court's intervention.

Under the Federal Circuit's opinion, the federal government is entirely free to nationalize private industries under its broad police power without the constitutional obligation to pay "just compensation." The decision prevents a claimant whose property has

been rendered "worthless" by regulatory action specifically intended to prevent the claimant from pursuing its business or performing under its contracts from receiving "just compensation" under the Fifth Amendment as a matter of law. This holding has ramifications far beyond this case. The significant adverse effect on private property from this erroneous precedent is extremely far reaching, both nationally and internationally. If allowed to stand, the Federal Circuit's extraordinary conclusion has the potential to eviscerate traditional concepts of private property rights by allowing the federal government to readily seize private property without complying with the Fifth Amendment's mandate to pay "just compensation." Internationally, this erroneous precedent would provide foreign governments with a justification for usurping the businesses of United States companies with impunity based on their claimed national interests – and without compensation.

A. The Decision Below Conflicts With This Court's Takings Jurisprudence

This Court has recognized that given the Federal Circuit's exclusive jurisdiction over certain matters, its rulings are of special importance "to the entire Nation." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993). In keeping with this recognition, the Court grants review of cases emanating from the Federal Circuit, particularly where, as here, the court has departed from the course chartered by this Court. *See, e.g., KSR Int'l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1735, 1743 (2007) (granting certiorari "[b]ecause the Court of Appeals addressed the question of obviousness

in a manner contrary to [the relevant statute] and our precedents," and holding that "the fundamental misunderstandings identified above led the Court of Appeals in this case to apply a test inconsistent with our [prior] decisions."); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 727-28 (2002) (granting certiorari in part because the Federal Circuit departed from the Court's past precedent). Here, the Federal Circuit has departed from this Court's takings jurisprudence in two distinct ways. First, the court improperly invoked *Omnia*, a case barring claimants from recovery under the Fifth Amendment for remote or incidental injuries, to deny "just compensation" in a case that epitomizes a taking contemplated by the Fifth Amendment. Second, the court limited *Kimball Laundry*'s holding in an unsupportable manner that disregards this Court's reasoning in that case.

1. The Federal Circuit's Restrictive Application of *Omnia* Contravenes The Reasoning Of That Case and The Court's Subsequent Takings Decisions

A bedrock principle enunciated by this Court's takings jurisprudence is that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In furtherance of this fundamental precept, the Court has developed certain "takings tests" based on factual inquiry to determine when "'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than

remain disproportionately concentrated on a few persons." *Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (citing *Armstrong*, 364 U.S. at 49; *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)); *Lucas*, 505 U.S. at 1015.

Nevertheless, having acknowledged the existence of Petitioner's property right, as the Federal Circuit explicitly did here, the Federal Circuit ignored completely the standards set forth in *Penn Central*, 438 U.S. at 104, or *Lucas*, 505 U.S. at 1003, which should have been applied to the direct usurpation of Petitioner's property by governmental action. The Federal Circuit's decision defies the guiding principles carefully laid down by this Court, and if left standing, would create an enormous loophole by which the government could use *Omnia* to justify direct regulatory taking of private property rights without the rigorous inquiry mandated by this Court. It is exactly this type of rigid determination that has generally been eschewed by the Court in this context. *See Penn Central*, 438 U.S. at 123; *Lucas*, 505 U.S. at 1015.

To be sure, *Omnia* is applicable to situations in which injury resulting from governmental action is too indirect to fall within the Fifth Amendment's scope. 261 U.S. at 508. But, *Omnia* does *not* – and should not – stand for the proposition that regulatory action to nationalize an industry, aimed directly at abrogating private contract rights, is not, as a matter of law, within the Fifth Amendment's protection and exempt from a proper analysis pursuant to this Court's takings jurisprudence.

In *Omnia*, the seminal case on consequential losses in the takings context, which this Court has not illuminated for eighty-five years, this Court held that a manufacturer, which had a contract to purchase steel from the producer of the steel, had no takings claim where the government, during wartime, appropriated the steel belonging to the steel producer before it had been delivered to the manufacturer. 261 U.S. at 511. Reasoning that the government had appropriated the subject matter of the contract (steel), and had not appropriated the contract itself, this Court applied the general principle that "for consequential loss or injury resulting from lawful governmental action[,] the law affords no remedy." *Id.* at 510. The Court acknowledged, however, that its reasoning did *not* apply to cases where the contract at issue is "an integral part of" the property taken. *Omnia*, 261 U.S. at 513 (citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893)).

It bears emphasis that in *Omnia*, the government's objective was simply to obtain steel, not to eliminate, much less supplant, private manufacturers who used steel. Indeed, the statute did not even target property belonging to the manufacturer (the steel still resided with the steel producer), and therefore the injury was truly "consequential." *Id.* at 510. If ATSA had closed domestic airports or appropriated all domestic aircraft for military use, the effect on Petitioner from the absence of domestic passengers to screen would be incidental. *See, e.g., Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed Cir. 2005).[1] But that situation

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[1] The Federal Circuit erroneously likened this case to *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Cont'd)

is vastly different from the one created by the Act which was specifically designed to nationalize the entire baggage screening industry, replaced Petitioner's business with a government monopoly, and made it illegal for Petitioner to perform under its existing contracts. It is hard to imagine a more direct, less "incidental," impact on Petitioner.

2. The Federal Circuit's Assault on the Fifth Amendment Mistakenly Limits This Court's Decision in *Kimball Laundry*

While unduly expanding *Omnia* to constrict the Fifth Amendment's protection of private property, the

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(Cont'd)

(Fed Cir. 2005), which had applied *Omnia* to an injury that was ultimately derivative. In *Air Pegasus*, the lessee of a heliport brought a takings claim based on the government's prohibition on the use of airspace above the heliport after September 11, 2001. *Id.* at 1210. The Federal Circuit held that the plaintiff could not support such a claim, because as the plaintiff conceded, it was seeking recompense for a "'derivative injury.'" *Id.* at 1215. In assessing whether Air Pegasus suffered a taking, the Federal Circuit stated that "a claimant seeking compensation from the government for an alleged taking of private property must, at a minimum, assert that its property interest was actually taken by the government action." *Id.* at 1215. The court found Air Pegasus's only property interest was in a leasehold, the Government had taken no action to regulate that interest, and the claimant thus "failed to assert a cognizable property interest for purposes of the Fifth Amendment." *Id.* at 1217-18. In contrast, here, Petitioner's property – made up of its contracts, goodwill, and going-concern value – were taken by ATSA, a statute whose direct and intended purpose was to replace private screening companies with a government monopoly and to eliminate Petitioner's property.

Federal Circuit's opinion also erroneously narrows this Court's decision in *Kimball Laundry v. United States*, 338 U.S. 1 (1949), to limit the compensation due those few claimants who could still survive its overly stringent "takings test." The Federal Circuit held, "Moreover, going concern value is a property interest that has been held to be compensable in the context of a temporary, but not a permanent, taking." (Pet. App. 24a (citing *Kimball Laundry*, 338 U.S. at 11).) This interpretation is clearly contrary to the decision in *Kimball Laundry* itself, is not supported by any Supreme Court precedent, and provides yet another reason to grant this Petition for Certiorari.

As this Court explained in *Kimball Laundry*, there are two circumstances in which compensation clearly is due for goodwill and going-concern value: (1) when the taking of the physical assets is temporary (as in *Kimball Laundry* itself), *see* 338 U.S. at 15; and (2) when the government usurps the business and establishes a monopoly, "as where public-utility property has been taken over for continued operation by a governmental authority," *id.* at 12. The latter kind of taking, which occurred here – unquestionably is permanent rather than temporary – and gives rise to a right of compensation for lost goodwill and going-concern value because the government has precluded the takings claimant from realizing the value of its business. *See id.* at 12-13.

The Federal Circuit's flawed attempt to limit *Kimball Laundry*'s holding is also contrary to this Court's determination that temporary takings are "not different in kind from permanent takings, for which the

Constitution clearly requires compensation." *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304, 318 (1987). Whether a property interest is compensable turns, not on the duration of the taking, but on state-law and other common-law concepts of property. *See Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (citing *Lucas*, 505 U.S. at 1030). The Federal Circuit's incorrect conclusion limiting the compensation due to claimants whose property has been permanently taken should be addressed so that its erroneous pronouncement in *Kimball Laundry* cannot be used to deny compensation intended by this Court's jurisprudence.

B. The Decision Below Creates an Intra-Circuit Conflict in the Federal Circuit Having Exclusive Jurisdiction Over Similar Claims, Thus Necessitating This Court's Review Without Further Percolation in the Federal Courts of Appeal

Because the Federal Circuit has exclusive jurisdiction over takings claims brought against the federal government (28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1295(a)(3)), there is no need to await further percolation of this issue. Here, the Federal Circuit's decision, which conflicts with its own prior jurisprudence, engenders confusion tantamount to a conflict within the circuits on the vital issue of the scope of the Fifth Amendment's protections in the context of regulatory takings impacting private contract rights. This Court has granted certiorari under the circumstances, recognizing that conflict among the circuits may never

arise. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 727 (2002) (granting certiorari in part where the Federal Circuit departed from its own past precedent); *Cardinal Chem. Co. v. Morton Int'l*, 508 U.S. 83, 88 (1993) (granting certiorari to resolve question within the Federal Circuit relating to patents); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997) (granting certiorari in light of "[t]he significant disagreement within the Court of Appeals for the Federal Circuit" and to endeavor to clarify the scope of the doctrine at issue).

The Federal Circuit has distorted *Omnia* in varying and conflicting ways to justify its increasingly crabbed interpretation of when the Fifth Amendment requires the payment of "just compensation," culminating in its extraordinary holding here. Apart from the obvious legal error of the Federal Circuit's reasoning, the decision that this case is not controlled by its prior decision in *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir 2003) (Pet. App. 21a, 23a), illuminates a conflict within the Federal Circuit, which has virtually complete jurisdiction over Fifth Amendment takings cases. The Federal Circuit's holding here that *Omnia* precludes a finding that the Act constituted a "taking" of Petitioner's property requiring the payment of "just compensation" (Pet App. 16a), is directly at odds with its conclusion in *Cienega Gardens* that legislation aimed at private contract rights amounts to *more* than the consequential effect described in *Omnia*

and requires that such compensation be paid, 331 F.3d at 1335.[2]

In *Cienega Gardens*, the claim was brought by owners of real estate who had permitted their premises to be used as public housing for a period of twenty years, in return for favorable loan terms. *See id.* at 1325. Under the terms of the loans the owners had negotiated with private banks and in accordance with then existing regulations, the owners could pre-pay their forty-year mortgages at the end of the twenty-year term and thus free up the property for private use. *Id.* at 1325-26. Before twenty years had passed, the federal government enacted legislation prohibiting exercise of the twenty-year termination clause, precluding the owners from exiting the public housing program. *See id.* at 1326. The owners alleged this legislation constituted a taking of their contractual and other property rights. In dismissing the suit, the Court of Federal Claims held (among other things) that governmental interference with private contracts, as a matter of law, amounted only to frustration resulting in "consequential loss[es]" under *Omnia* – and not a taking. *See Cienega Gardens*, 331 F.3d at 1334-35. On appeal, the Federal Circuit disagreed, explaining that "[t]he proposition in *Omnia* about consequential loss or injury refers to legislation targeted at some public benefit, which incidentally affects contract rights, not, as in this case, *legislation*

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[2] Indeed, the Federal Circuit's finding in *Cienega Gardens* that "*Omnia* is relevant to this case only because it confirms that contract rights can be property within the meaning of the Fifth Amendment and require compensation 'if taken for public use,'" 331 F.3d at 1335, is equally applicable here.

aimed at the contract rights themselves in order to nullify them." *Id.* (emphasis added). Because the enactment of the offending legislation "directly and intentionally abrogated the contracts," *Omnia* was inapplicable. *Cienega Gardens*, 331 F.3d at 1335.[3]

By its express terms, the Act was aimed directly at screening contracts, including Huntleigh's contracts, in order to nullify them and to make way for federalization.

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[3] In *Cienega Gardens v. United States*, 503 F.3d 1266, 1278 (Fed. Cir. 2007), *cert. dismissed*, No. 07-1100, 2008 WL 512725 (Aug. 1, 2008), a specially convened panel of the Federal Circuit discussed the way in which the trial court should have assessed certain of the *Penn Central* factors in determining whether a taking had occurred. The court, however, did not alter its prior conclusions regarding *Omnia*. The court reiterated that:

> The focus of the regulatory takings analysis is on fundamental fairness – is it fair for the government to impose the cost of a regulation on private parties rather than on the public as a whole through public spending? To make this determination, there is no set formula. There simply is no bright line dividing compensable from noncompensable exercises of the Government's power when a regulatory imposition causes partial loss to the property owner. What is necessary is a classic example of judicial balancing of competing values. Thus the regulatory takings analysis is characterized by an essentially ad hoc, factual inquiry . . . designed to allow careful examination and weighing of all the relevant circumstances.

Id. (citing, *inter alia*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Penn Central*, 438 U.S. at 123; *Tahoe-Sierra Pres Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (internal alterations and quotation marks omitted).)

Indeed, the Act goes even further by requiring that the government be the exclusive provider of screening services and legally precluding Huntleigh from continuing to perform under its agreements or entering into any other contracts for the provision of these services. In direct conflict with its explicit holding in *Cienega Gardens*, that *Omnia* does not legally foreclose an action such as the one brought by Huntleigh, the Federal Circuit here reached the diametrically opposite conclusion that this type of claim "can not stand." (Pet. App. 16a.)

The Federal Circuit also adopted a *second* holding in direct conflict with *Cienega Gardens*. The Federal Circuit held that, "Huntleigh was not a party to any agreement or contract with the federal government that was later unilaterally altered by statute. Rather, Huntleigh's contracts with various commercial airlines were frustrated by a shift in the government's regulation of the airlines. *Cienega Gardens* therefore does not support Huntleigh's takings claim." (Pet. App. 23a.) In *Cienega Gardens*, the court stated just the opposite: "the trial court implied that, under *Omnia*, if the government is not a party to the contract, the effect of the legislation on a private contract can only be consequential and there can be no taking of a contract right. . . . *Omnia* does not support any such rule." *Cienega Gardens*, 331 F.3d at 1335.

The holdings of *Cienega Gardens* and *Huntleigh* cannot be reconciled and represent a clear conflict within the Federal Circuit necessitating this Court's immediate intervention. Given the Federal Circuit's exclusive jurisdiction over takings claims against the United

States Government, such a conflict amounts to a split between the circuits and should this conflict go unresolved, claimants with legitimate Fifth Amendment claims will be left unsure of their rights under the Fifth Amendment or worse, will conclude they cannot prevail under Federal Circuit precedent and will forego bringing such claims.

C. The Issue Presented By This Case Is Important, Recurring, and Has Far-Reaching Ramifications

If left standing, the Federal Circuit's opinion will trample on the rights guaranteed to property owners by the very text of the Fifth Amendment. By holding that a claim based on regulation which, on its face, directly regulates private contractual rights, rendering that cognizable property interest "worthless [,] . . . cannot stand" (Pet. App. 16a), the Federal Circuit's opinion effectively undermines, if not eliminates, the crucial protections afforded by the Fifth Amendment, not only in this case, but in a wide array of potential contexts. It also will encourage the government to enact far-reaching regulations without the cost of providing corresponding and constitutionally mandated compensation. For example, the government could enact legislation requiring that the nation's airline industry be operated exclusively by a federal agency using federal employees. Of course, such a regulation would render private airlines, many of which are publicly traded companies, worthless and all the equipment owned by them would have "fire sale" or salvage value as private airlines would no longer be permitted to operate their planes domestically. In such a situation, airline employees would have no real choice but to

become federal employees, if given the chance to do so. Under the Federal Circuit's opinion, the private airline would have no recourse. Indeed, no industry would be safe from federalization, and the government could do it without paying for what it had taken and destroyed. This Court has not hesitated to intervene under these circumstances to prevent further erosion of these fundamental rights. *See Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979) ("There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, *if carried to its ultimate conclusion, might completely swallow up any private claim for 'just compensation' under the Fifth Amendment . . . .*") (emphasis added); *see also Ruckelshous v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) ("If Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. This Court has stated that a sovereign, 'by ipse dixit, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)); *Eastern Enters. v. Apfel*, 524 U.S. 498, 536 (1998) ("[T]he Constitution does not permit a solution to the problem of funding miner' benefits that imposes such a disproportionate and severely retroactive burden upon Eastern.").

The potential implications of the Federal Circuit's decision are by no means limited to domestic businesses. The profound potential international implications reinforce the need for this Court to correct the Federal

Circuit's opinion. A decision upholding the government's unfettered right to nationalize an entire private industry – without requiring compliance with the Fifth Amendment's explicit mandate to pay "just compensation" – can only serve to embolden foreign governments to nationalize private businesses, including those belonging to United States' companies, with impunity, invoking the Federal Circuit's jurisprudence as justification. Indeed, if the Federal Circuit's decision is allowed to stand, countries like Russia and Venezuela, which have increasingly nationalized private property without proper compensation will need only point to the rule of law in the United States to justify their actions in the face of international protest. *See, e.g.*, Andrew E. Kramer, *In Dispute with BP, Kremlin's Hand is Seen*, NY Times, July 19, 2008; Simon Romero, *Chavez Seizes Greater Economic Power*, NY Times, May 18, 2008. This Court's review of the decision below is warranted in light of the significant and far-reaching ramifications of this erroneous precedent which will lead to an erosion of the basic principles embodied in the Fifth Amendment.

CONCLUSION

For the foregoing reasons, we respectfully request that Huntleigh's petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED MAY 15, 2008

UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

No. 2007-5118.

HUNTLEIGH USA CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

May 15, 2008.

Before NEWMAN, MAYER, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

Huntleigh USA Corporation ("Huntleigh") is a corporation in the business of providing passenger and baggage screening services at airports throughout the United States. During the period between 1989 and early 2002, airlines contracted with Huntleigh in order to meet their responsibilities for passenger and baggage screening under the Air Transportation Security Act of

1974, Pub.L. No. 93-366, 88 Stat. 415 (1974) ("Air Transportation Security Act") (repealed 1994).

Following the terrorist attacks of September 11, 2001, Congress enacted, and the President signed into law, the Aviation and Transportation Security Act, Pub.L. No. 107-171, 115 Stat. 597 (2001) (codified in scattered sections of 5 U.S.C. and 49 U.S.C.) ("ATSA"). Two of ATSA's provisions are pertinent to this appeal. The first provision, section 101(g)(1), 49 U.S.C. § 44901 (note) (Supp. I 2001), provided that the Under Secretary of Transportation for Security was to assume all security and screening functions at United States airports. The second provision, section 101(g)(2), *id.*, provided that the Under Secretary of Transportation could perform those functions by assuming the contracts of private companies that, at the time, provided security and screening functions at airports. If the government chose to accomplish its security and screening obligations via this route, the statute required that it pay adequate compensation to the private companies whose contracts were assumed. *Id.* ATSA's transfer of responsibility for passenger and baggage screening from airlines to the federal government had the effect of bringing to an end Huntleigh's security screening contracts with airlines.

In November of 2003, Huntleigh filed suit in the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000). In its suit, Huntleigh alleged that ATSA's transfer of responsibility for passenger and baggage screening resulted in a taking of its property without just compensation, in violation

of the Fifth Amendment to the Constitution. Huntleigh also alleged that it was entitled to compensation under section 101(g)(2) of ATSA. In November of 2006, the Court of Federal Claims conducted a four-day trial on Huntleigh's claims. Thereafter, on March 15, 2007, the court rendered a decision in which it rejected both of Huntleigh's claims and ordered the dismissal of Huntleigh's complaint. *Huntleigh USA Corp. v. United States*, 75 Fed.Cl. 642 (2007). The court ruled that Huntleigh's takings claim failed because Huntleigh had failed to establish that its property had been taken by the government. *Id.* at 645-46. The court ruled against Huntleigh on its claim for compensation under section 101(g)(2) of ATSA on the ground that the government had not assumed any of Huntleigh's contracts. *Id.* at 649.

Huntleigh now appeals the decision of the Court of Federal Claims. Because we conclude that governmental action did not effect the taking of Huntleigh's property under the Fifth Amendment and that the *1374 government did not assume Huntleigh's security screening contracts so as to entitle Huntleigh to compensation under section 101(g)(2) of ATSA, we affirm the court's decision.

Appendix A

BACKGROUND

I.

The facts pertinent to this case are not in dispute. With the enactment of the Air Transportation Security Act in 1974, Congress directed the Federal Aviation Administration to require airlines to implement security programs to screen all passengers and luggage traveling in commercial aviation. Air Transportation Security Act, Pub.L. No. 93-366, § 315(a), 88 Stat. 415, 415 (1974) ("The Administrator shall prescribe . . . reasonable regulations requiring that all passengers and all property intended to be carried in the aircraft cabin in air transportation . . . be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier. . . ."). In order to meet their obligations under the statute, most airlines hired private security contractors to perform the required passenger and baggage screening.

Huntleigh began offering passenger screening services in 1989, and it assumed baggage screening functions in 1999. As of November 19, 2001, when ATSA became law, Huntleigh had in place contracts with approximately 75 airlines. The contracts covered passenger and baggage screening at some 35 airports across the United States.

The provisions of Huntleigh's contracts varied. Some contracts contained set periods of performance, whereas others simply continued indefinitely.

All contracts, however, were terminable upon one party's providing a certain number of days notice to the other party. Huntleigh contends, and the government does not dispute, that, as of 2001, Huntleigh had acquired an excellent reputation in the industry and that no major airline had terminated a contract with Huntleigh since 1991.

II.

In the wake of the terrorist attacks of September 11th, Congress reassessed the effectiveness of the screening regime created by the Air Transportation Security Act, wherein airlines were responsible for screening functions and generally met that responsibility by hiring private contractors such as Huntleigh. Specifically, Congress determined that the federal government, through a new federal agency, the Transportation Security Administration ("TSA"), could more effectively provide screening services at airports than could private contractors. *See* H.R.Rep. No. 107-296, at 53-54 (2001), U.S.Code Cong. & Admin.News 2002, pp. 589, 590 ("The conferees . . . note the terrorist hijacking and crashes of passenger aircraft on September 11, 2001 . . . required a fundamental change in the way [the conferees] approach [ ] the task of ensuring the safety and security of the civil air transportation system. The Conferees expect that security functions at United States airports should become a Federal government responsibility. . . ."). Consequently, Congress enacted ATSA, thereby assigning all airport screening responsibilities to the TSA, rather than commercial airlines.

Appendix A

ATSA imposed screening responsibilities upon the federal government and set forth a way in which the government could meet those responsibilities. Thus, section 101(a) of ATSA amended 49 U.S.C. § 114(d) to provide that the Under Secretary of Transportation "shall be responsible for security in all modes of transportation," and ATSA section 101(g)(1) stated that, not later than three months after the enactment of ATSA, the Under Secretary of Transportation "shall assume civil aviation security functions and responsibilities." ATSA section 101(g)(2), in turn, provided that, in order to meet the government's responsibilities, the Under Secretary of Transportation "may assume the rights and responsibilities of an air carrier or foreign air carrier contract for provision of passenger screening services at airports in the United States." If the Under Secretary of Transportation chose to meet the government's obligations under ATSA by assuming a contract that existed between an airline and a private screening contractor, section 101(g)(2) required the "payment of adequate compensation to parties to the contract."

Though ATSA nowhere expressly forbade Huntleigh or other private contractors from continuing to provide airport screening functions, it effectively eliminated the market for such services, given that it concentrated all screening functions in the federal government. Thus, although no airline other than American Airlines specifically sent a termination notice to Huntleigh, Huntleigh and the other airlines with which it had contracts treated their contracts as

terminated upon the government's full assumption of screening functions at airports, resulting in a considerable loss of business to Huntleigh.

III.

As noted above, Huntleigh filed suit in the Court of Federal Claims under the Tucker Act, alleging that ATSA's transfer of responsibility for security screening from airlines to the federal government resulted in a taking of its property without just compensation in violation of the Fifth Amendment. Huntleigh also alleged that it was entitled to compensation under section 101(g)(2) of ATSA. Following a trial, the Court of Federal Claims rendered a decision rejecting both of Huntleigh's claims and ordering the dismissal of Huntleigh's complaint. *See generally Huntleigh.*

The Court of Federal Claims began by addressing Huntleigh's takings claim. Huntleigh alleged the taking of several property interests. Huntleigh contended first that the government had appropriated its contracts with the airlines. Though Huntleigh conceded that the government had not actually substituted itself as a party to any of its contracts, it argued that the government had effectively appropriated the contracts insofar as it had taken upon itself the responsibility of performing precisely the functions formerly performed by Huntleigh. *Id.* at 645. Huntleigh relied upon *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir.2003), to establish entitlement to compensation for the taking of its contractual rights. *Huntleigh*, 75 Fed.Cl. at 646.

Second, Huntleigh argued that the government had effected a taking by destroying the going concern value and goodwill associated with its security screening business. *Id.* In advancing this argument, Huntleigh relied upon *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), to establish the compensability of going concern value and goodwill,[1] *see id.* at 10-11, 69 S.Ct. 1434. *Huntleigh*, 75 Fed.Cl. at 646.

Turning first to the alleged taking of Huntleigh's security screening contracts, the Court of Federal Claims determined that the contracts were not taken by the government. *Id.* at 645-46. The court noted that all the contracts between Huntleigh and the airlines contained termination clauses, generally requiring from 30-90 days advance notice, thus permitting either party to terminate a contract. *Id.* at 646. The court further noted that, except for American Airlines, none of the airlines with which Huntleigh had contracts had terminated their contracts. *Id.* Rather, following the enactment of ATSA, they had allowed the contracts to expire pursuant to their terms. *Id.* Under these circumstances, the court

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1. *Kimball Laundry* describes "going-concern value" as the inertia associated with the clientele of any established business, as a result of which at least a certain percentage of the customers of a business can likely be expected to continue to patronize the business so long as it remains solvent. 338 U.S. at 10-11, 69 S.Ct. 1434. "Goodwill" consists of "[a] business's reputation, patronage, and other intangible assets that are considered when appraising the business." *Black's Law Dictionary* 715 (8th ed.2004).

reasoned, Huntleigh could not properly contend that its contracts were taken by the government. *Id.* The court further reasoned that, despite the fact that ATSA was the reason for the expiration of Huntleigh's contracts, the government could not be deemed to have committed a taking of Huntleigh's property because ATSA did not regulate Huntleigh. *Id.* Rather, by eliminating any screening obligations the airlines formerly possessed and transferring those obligations to the federal government, the statute embodied regulatory action with respect to the airlines. *Id.* Citing *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923), and *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed.Cir.2005) ("*Air Pegasus II*"), the court determined that governmental action directed at third parties had frustrated Huntleigh's expectations under its contracts, but that this circumstance did not provide the basis for a cognizable takings claim. *Huntleigh*, 75 Fed.Cl. at 646.

The Court of Federal Claims also rejected Huntleigh's claim for compensation based upon the alleged taking of going concern value and goodwill. The court reasoned that going concern value and goodwill could not be deemed to have been taken when, as in the case before it, there had not been a taking of the underlying business with which the going concern value and goodwill were associated. *Id.* Since the government did not appropriate Huntleigh's business, but rather simply assumed many of the same functions Huntleigh had formerly performed, Huntleigh was unable to allege that the government actually took its business and

therefore could not allege a taking of going concern value and goodwill. *Id.*

Having disposed of Huntleigh's takings claim, the Court of Federal Claims turned to Huntleigh's second claim: that it was entitled to compensation under section 101(g)(2) of ATSA. In advancing this claim, Huntleigh acknowledged that the government had not actually stepped into its shoes under the various security screening contracts with the airlines, so as to be deemed to have assumed "the rights and responsibilities of an air carrier or foreign air carrier contract for provision of passenger screening services at airports," as contemplated by section 101(g)(2). *Id.* at 648. Rather, Huntleigh argued that the statute did not require a literal assumption of the contracts. *Id.* According to Huntleigh, the statute mandated compensation if, as in Huntleigh's case, the government assumed the responsibilities formerly borne by a private contractor. *Id.*

The Court of Federal Claims rejected Huntleigh's argument, concluding that section 101(g)(2) of ATSA did not provide authority for awarding Huntleigh compensation for its lost business. *Id.* at 648-49. In reaching that conclusion, the court relied primarily upon a textual comparison between sections 101(g)(1) and 101(g)(2) of the statute. As seen, section 101(g)(1) provided that the government "shall" assume all screening functions at national airports. *Id.* at 647 (emphasis added). By contrast, section 101(g)(2) provided that the government "*may*" effect this

obligation by substituting itself as a party into contracts that formerly existed between the airlines and private screening contractors. *Id.* (emphasis added). Were Huntleigh's view of ATSA correct, the Court of Federal Claims reasoned, the statute, in section 101(g)(1), would have required the government to assume screening functions and then, in section 102(g)(2), would have provided that compensation be paid to former private screeners upon the assumption of such functions. The statute's use of the permissive word "may" in section 101(g)(2), however, conveyed to the court that Congress did not intend for section 101(g)(2) to set forth the sole means by which the government could assume screening responsibilities under ATSA. *Id.* at 648. Thus, the court determined that the requirements of section 101(g)(2) only applied when the government actually assumed a contract between private parties, rather than when the government undertook to perform functions formerly performed by one of the parties. *Id.* at 648-49. Since Huntleigh conceded that the government had not actually assumed any of its security screening contracts, the court determined that section 101(g)(2) did not require compensation. *Id.* at 649. Based upon its rulings, the Court of Federal Claims entered judgment in favor of the United States and dismissed Huntleigh's complaint. *Id.* This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

Appendix A

DISCUSSION

On appeal, Huntleigh argues that the Court of Federal Claims erred in holding that the enactment of ATSA did not result in the taking of its security screening contracts, going concern value, and goodwill. Huntleigh also argues that the court erred in holding that it was not entitled to compensation under section 101(g)(2) of ATSA on account of what it alleges was the government's de facto assumption of its security screening contracts. We address these contentions in turn.

I.

The issue of whether a taking has occurred is a question of law based on factual underpinnings. *Stearns Co. v. United States*, 396 F.3d 1354, 1357 (Fed.Cir.2005); *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1350-51 (Fed.Cir.2003); *Washoe County v. United States*, 319 F.3d 1320, 1325 (Fed.Cir.2003). As noted above, in this case, the pertinent facts are not in dispute. Consequently, our consideration of Huntleigh's takings claim reduces to a question of law. We review *de novo* a ruling by the Court of Federal Claims on a question of law. *Columbia Gas Sys., Inc. v. United States*, 70 F.3d 1244, 1246 (Fed.Cir.1995).

The Takings Clause of the Fifth Amendment of the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The purpose of

the Takings Clause is to prevent "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). We have developed a two-part test for determining whether "fairness and justice" require compensation for burdens imposed by a particular governmental action.

First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment. *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed.Cir.2004); *see also Maritrans*, 342 F.3d at 1351. That is because "only persons with a valid property interest at the time of the taking are entitled to compensation." *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed.Cir.2001). The protections of the Takings Clause apply to real property, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992), personal property, *see Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979), and intangible property, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04, 104 S.Ct. 2862, 2873, 81 L.Ed.2d 815 (1984). In this case, it is undisputed that the property interests Huntleigh alleges were taken are, for purposes of the Fifth Amendment, cognizable property interests.

Second, "after having identified a valid property interest, the court must determine whether the government action at issue amounted to a compensable

taking of that property interest." *Am. Pelagic*, 379 F.3d at 1372; *see also Maritrans*, 342 F.3d at 1351. A compensable taking can occur not only through the government's physical invasion or appropriation of private property, *see Lucas*, 505 U.S. at 1014-15, 112 S.Ct. 2886; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 3171, 73 L.Ed.2d 868 (1982), but also by government regulations that unduly burden private property interests, *see Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).[2]

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2. Regulatory takings are further subdivided into categorical and non-categorical takings. A categorical taking occurs when "all economically viable use, i.e., all economic value, has been taken by the regulatory imposition." *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed.Cir.2001) (citation omitted); *see also Am. Pelagic*, 379 F.3d at 1372. Conversely, a non-categorical taking is a taking "that is the consequence of a regulatory imposition that prohibits or restricts only some of the uses that would otherwise be available to the property owner, but leaves the owner with substantial viable economic use." *Rith Energy*, 247 F.3d at 1362 (citation omitted). Determining whether a non-categorical taking occurred involves the fact-based inquiry stated in *Penn Central*, under which a court considers (1) the character of the governmental action, (2) the economic impact of the action on the claimant, and (3) the effects of the governmental action on the reasonable investment-backed expectations of the claimant. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39, 125 S.Ct. 2074, 2081-82, 161 L.Ed.2d 876 (2005); *Am. Pelagic*, 379 F.3d at 1372; *Maritrans*, 342 F.3d at 1351; *Conti v. United States*, 291 F.3d 1334, 1339 (Fed.Cir.2002); *Rith Energy*, 247 F.3d at 1362.

Appendix A

II.

A.

Huntleigh argues that the Court of Federal Claims erred in holding that ATSA did not effect a taking of its security screening contracts and the going concern value and goodwill associated with its security screening business. Huntleigh contends that its business relationships were not merely "frustrated." It argues that ATSA, by establishing the federal government as the only party allowed to perform security screening at national airports, specifically illegalized the subject matter of its contracts with the airlines. Huntleigh distinguishes both *Omnia* and *Air Pegasus II* on the ground that the statute at issue in this case was far more direct in terms of its impact on Huntleigh than the governmental actions in *Omnia* and *Air Pegasus II* were on the plaintiffs in those cases. *Omnia* and *Air Pegasus II*, Huntleigh argues, involved governmental regulation applicable to one party that resulted in a loss to a third party. Huntleigh asserts that ATSA, by contrast, applied *directly* to the contracts between the airlines and Huntleigh, by illegalizing their subject matter. Huntleigh urges that *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1903), *NL Industries, Inc. v. United States*, 839 F.2d 1578 (Fed.Cir.1988), and *Cienega Gardens*, compel the conclusion that ATSA did effect a taking of its property. Finally, Huntleigh claims that the Court of Federal Claims erred in its application of *Kimball Laundry* to the alleged taking of the going concern value and goodwill associated with its security screening business.

The government responds by asserting that *Omnia* and *Air Pegasus II* control the outcome of this case. The government notes that Congress created the airlines' obligation to screen passengers and baggage with the enactment of the Air Transportation Security Act and then eliminated that obligation with the enactment of ATSA, mandating that the government assume the screening obligations formerly borne by the airlines. Thus, the government posits, the statutory mandate focused upon airlines, not upon private contractors, such as Huntleigh. The government states that, although ATSA undoubtedly diminished the demand for Huntleigh's services and negatively impacted its business, such effects were indirect consequences of ATSA's regulating the airlines and thereby comprised mere "frustration" of Huntleigh's business interests.

B.

The Court of Federal Claims did not err in holding that Huntleigh had failed to establish a Fifth Amendment taking of its property. Huntleigh has conceded that the government did not actually assume its contracts. Instead, the government engaged in the functions formerly performed by Huntleigh under the contracts. Thus, any takings claim cannot be predicated upon a taking of the contracts. Rather, the argument must be that ATSA rendered the contracts and the going concern value and goodwill associated with Huntleigh's security screening business worthless. Such a claim cannot stand, however, in the face of *Omnia* and *Air Pegasus II*.

Appendix A

In *Omnia*, the plaintiff Omnia Commercial Co. ("Omnia") owned a contract entitling it to purchase a large quantity of steel plate from the Allegheny Steel Company ("Allegheny") for an amount below the current market price. 261 U.S. at 507, 43 S.Ct. 437. Before any deliveries were made under the contract, however, the government, pursuant to statute and in order to meet needs caused by World War I, requisitioned Allegheny's entire production of steel plate for 1918 and directed it not to comply with its contract with Omnia. *Id.* In due course, Omnia filed suit in the Court of Claims, alleging that the government's actions with respect to Allegheny and Allegheny's contract with Omnia had effected a taking of Omnia's right to priority to the steel plate Allegheny expected to produce. Omnia alleged that the government had therefore appropriated "for public use [Omnia's] property in the contract," causing Omnia to suffer a large monetary loss as a consequence of its losing a lucrative contract. *Id.* at 507-08, 43 S.Ct. 437. After the Court of Claims dismissed Omnia's complaint, Omnia appealed to the Supreme Court. The Supreme Court affirmed the decision of the Court of Claims. *Id.* at 514, 43 S.Ct. 437. The Court started from the premise that Omnia's contract with Allegheny was "property within the meaning of the Fifth Amendment" and that if the contract was "taken for public use the government would be liable." *Id.* at 508, 43 S.Ct. 437. The Court held, however, that Omnia's contract with Allegheny had not been taken:

> In exercising the power to requisition, the government dealt only with the steel company,

> which company thereupon became liable to deliver its product to the government, by virtue of the statute and in response to the [requisition] order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended.

Id. at 511, 43 S.Ct. 437.

In *Air Pegasus II*, the plaintiff, Air Pegasus of D.C., Inc. ("Air Pegasus") operated a heliport at property it leased in Washington, D.C. 424 F.3d at 1209. Following the terrorist attacks of September 11th, the Federal Aviation Administration ("FAA") banned all commercial air travel within twenty-five nautical miles of Washington, D.C., except at a few select locations, such as Ronald Reagan Washington National Airport. *Id.* As a consequence, Air Pegasus was effectively unable to continue the operation of its business. It thus abandoned its lease and ceased operations at the heliport. *Id.* at 1210. Subsequently, Air Pegasus brought suit in the Court of Federal claims alleging that the FAA's flight ban had resulted in the regulatory taking of its heliport business. *Id.* Eventually, the court granted summary judgment in favor of the government and dismissed Air Pegasus's complaint. *Air Pegasus of D.C., Inc. v. United States*, 60 Fed.Cl. 448, 459 (2004). The court did so after concluding that "although the FAA's regulatory activity may have had an adverse impact on [Air Pegasus's] heliport business," there was not a taking of any cognizable property interest of Air Pegasus. *Id.*

On appeal, we affirmed the decision of the Court of Federal Claims. *Air Pegasus II*, 424 F.3d at 1219. Noting that Air Pegasus did not own or operate any helicopters itself, we pointed out that Air Pegasus's economic injury was "not the result of the government taking Air Pegasus's property, but . . . the more attenuated result of the government's purported taking of other people's property. This circumstance does not form the basis for a viable takings claim." *Id.* at 1215. After comparing Air Pegasus's takings claim to that of the plaintiff in *Omnia*, we stated:

> Air Pegasus, which did not itself own or operate any helicopters, does not allege that the FAA's restrictions regulated *its* operations under the lease. Instead, Air Pegasus basically alleges that the FAA, by regulating helicopters owned by third parties, frustrated its business expectations at the South Capitol Street heliport. Therefore, like the appellant in *Omnia*, Air Pegasus, while no doubt injured by reason of the government's actions, has not alleged a taking of private property under the Fifth Amendment.

Id. at 1216 (emphasis in original).

As did the plaintiffs in *Omnia* and *Air Pegasus II*, Huntleigh alleges that it suffered a loss of business as a result of the government's regulation of a third party. The federal government imposed screening obligations upon commercial airlines in 1974. With the enactment

of ATSA in 2001, however, Congress drastically reduced the demand for Huntleigh's services. ATSA did not, however, regulate Huntleigh directly. Rather, it modified governmental regulation of the airlines, which resulted in adverse economic consequences for Huntleigh. Thus, any losses that Huntleigh suffered were indirect, arising only as a consequence of ATSA's elimination of the airlines' security screening obligations. In other words, ATSA had the effect of "frustrating" Huntleigh's business expectations, which does not form the basis of a cognizable takings claim. *See id.; Omnia*, 261 U.S. at 510, 43 S.Ct. 437.

As noted, Huntleigh argues that *Omnia* is distinguishable because, in that case, the government's action was directed at a third party, Allegheny, resulting in only an indirect impact on Omnia. However, urges Huntleigh, in this case ATSA was directed squarely at providers of airport security screening functions, such as Huntleigh, by nationalizing their operations. Similarly, Huntleigh maintains that *Air Pegasus II* is distinguishable because any effect that the FAA's flight ban had on Air Pegasus, which owned neither the heliport nor the helicopters, was indirect, as it arose from governmental regulation of third parties. We are not persuaded by Huntleigh's efforts to distinguish *Omnia* and *Air Pegasus II*. As far as Omnia is concerned, the facts of that case were more favorable to the plaintiff, *Omnia*, than the facts of this case are to Huntleigh. As seen, in *Omnia*, the government's actions were directed squarely at the contractual relationship that existed between Allegheny and Omnia. The government

requisitioned the steel plate that was meant for Omnia and directed Allegheny not to comply with its contract with Omnia. *Omnia,* 261 U.S. at 507, 43 S.Ct. 437. Yet, the Court held, there was no taking because, "[a]s a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated, but ended." *Id.* at 511, 43 S.Ct. 437. In this case, the purpose of ATSA was not to take action with respect to any security screening contract to which Huntleigh was a party. Rather, its purpose was to transfer security screening responsibilities from the airlines to the federal government. This action, directed at the airlines, frustrated Huntleigh's business interests. *Air Pegasus II,* which cited *Omnia,* is indistinguishable from this case because in both *Air Pegasus II* and this case the party alleging a taking, rather than having its own property taken, saw its business interests frustrated by governmental regulation of third parties (the FAA's flight ban in *Air Pegasus II,* and ATSA's transfer of screening responsibility here).

Finally, Huntleigh's reliance upon *Monongahela, Cienega Gardens,* and *NL Industries* is misplaced. None of these cases speaks to the situation presented here.

In *Monongahela,* a private company spent considerable sums of money on the improvement of the Monongahela River by means of locks and dams. 148 U.S. at 324, 13 S.Ct. 622. The United States government later condemned and appropriated the

locks and dams. *Id.* In the condemnation proceeding, the government conceded liability for the reasonable value of the appropriated property but disputed the amount of compensation due. *Id.* at 314, 13 S.Ct. 622. After reaffirming that takings law clearly established that the United States was liable for the appropriation of the property, *id.* at 324, 13 S.Ct. 622, the Court devoted the bulk of its opinion to determining the proper measure of damages, *id.* at 324-45, 13 S.Ct. 622. The facts of *Monongahela* clearly differ from the facts of the present case in that the government has not appropriated for its own use any property owned by Huntleigh. Rather, the government has merely relieved commercial airlines of a duty they formerly possessed, which action indirectly resulted in the elimination of the market for Huntleigh's business.

In *Cienega Gardens*, various property owners entered into regulatory agreements with the Department of Housing and Urban Development ("HUD"). 331 F.3d at 1325. The agreements provided that the property owners could prepay their forty-year mortgages after twenty years. *Id.* As the twenty year prepayment eligibility date approached, however, Congress determined that permitting prepayment would undermine efforts to provide low-cost housing. As a result, Congress temporarily suspended, and then later eliminated, the prepayment provisions through the enactment of statutes that required HUD approval for prepayment. *Id.* at 1326. We determined that Congress's enactment of such statutes effected a taking that

entitled certain of the property owners to just compensation. *Id.* at 1353. The facts of *Cienega Gardens*, however, differ significantly from those of this case. Here, Huntleigh was not a party to any agreement or contract with the federal government that was later unilaterally altered by statute. Rather, Huntleigh's contracts with various commercial airlines *1382 were frustrated by a shift in the government's regulation of the airlines. *Cienega Gardens* therefore does not support Huntleigh's takings claim.

Neither does *NL Industries* support Huntleigh. In that case, NL Industries ("NL") invested considerable resources in developing a fleet of vehicles to transport spent nuclear fuel rods for reprocessing. *NL Indus.*, 839 F.2d at 1579. NL's investment became valueless, however, when the President determined not to allow the plant that was to provide the spent fuel rods to operate. *Id.* Holding that NL had failed to establish a compensable taking, we stated: "The trial court, . . . rightly, we think, thought that Omnia . . . was, by itself, authority enough to support its holding that frustration of a business by loss of a customer was not a taking." *Id.* We believe that the facts of *NL Industries* are materially indistinguishable from the facts of the present case: a governmental action (ATSA) directed at a third party (airlines) resulting in the loss of business to a claimant (Huntleigh) who alleges a compensable taking. We concluded in *NL Industries* that *Omnia* foreclosed

the existence of a compensable taking, and we conclude the same with respect to Huntleigh's claim.[3]

III.

A.

We turn next to Huntleigh's claim under section 101(g)(2) of ATSA. As already seen, section 101(g)(2) provided that, if the Under Secretary of Transportation for Security chose to meet the government's obligations under ATSA by assuming a contract to provide security screening services, the government was required to pay adequate compensation to parties to the contract.

In alleging entitlement to compensation under section 101(g)(2), Huntleigh, as it did in the Court of Federal Claims, argues first that the clause "assume the

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3. Our reasoning applies to all property interests possessed by Huntleigh, including its contracts and any going concern value or goodwill associated with its security screening business. Thus, the authority of *Kimball Laundry* does not alter our holding. Though going concern value and goodwill are indeed compensable property interests, *Kimball Laundry*, 338 U.S. at 11, 69 S.Ct. 1434, those property interests, like Huntleigh's contracts, were merely "frustrated" by the government's enactment of ATSA. They were not taken. Moreover, going concern value is a property interest that has been held to be compensable in the context of a temporary, but not a permanent, taking. *See id.* at 15, 69 S.Ct. 1434; *Cooper v. United States*, 827 F.2d 762, 763 (Fed.Cir.1987); *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 903 (Fed.Cir.1986).

rights and responsibilities of an air carrier . . . contract," describing the conditions under which compensation is required, suggests that Congress intended that compensation be provided even when, as in this case, contracts were not actually assumed. According to Huntleigh, had Congress intended that compensation be provided only when contracts were actually assumed, it would have used the word "contracts" rather than the phrase "rights and responsibilities of . . . contract[s]." Noting the canon of statutory interpretation that the words of a statute are not to be rendered superfluous if such a construction can be avoided, *Walther v. Sec'y of Health & Human Servs.*, 485 F.3d 1146, 1150 (Fed.Cir.2007) (" '[A] statute should be interpreted so as not to render one part inoperative.' " (quoting *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979))), Huntleigh urges that section 101(g)(2) should be read to require compensation any time the government assumed the functions formerly performed by private parties under security screening contracts. Second, Huntleigh argues that, in any event, the government, for all intents and purposes, did effectively assume Huntleigh's contracts even if it did not literally insert itself as a party into any existing contract. In support of this argument, Huntleigh cites various statements by government officials speaking of "assuming" air carrier contracts.

The government responds to Huntleigh's arguments by reiterating the Court of Federal Claims' distinction between sections 101(g)(1) and 101(g)(2) of ATSA. The government argues that, in contrast to section 101(g)(1),

section 101(g)(2), upon which Huntleigh relies, imparted discretion to the Under Secretary of Transportation and created no enforceable rights. The government notes that section 101(g)(2) provided that, "[a]s of the date specified in paragraph (1)," i.e., February 19, 2002, "the Under Secretary *may* assume the rights and responsibilities of an air carrier or foreign air carrier contract for provision of passenger screening services at airports in the United States described in [49 U.S.C. §] 44903(c), subject to payment of adequate compensation to the parties to the contract, *if any*" (emphases added). The government takes the position that the purpose of section 101(g)(2) was to authorize, but not require, TSA to assume existing screening contracts, in order to meet the three-month deadline established by section 101(g)(1). In the event that TSA did assume an existing contract, the obligation to pay compensation arose. The government argues that Huntleigh's reading of the statute creates an illogical result. According to the government, that is because if, under the statute, the government was required to compensate Huntleigh even when it did not actually assume a contract-which is what Huntleigh urges-it would mean that section 101(g)(2) was essentially superfluous. The reason is that section 101(g)(1) specifically mandated that the government assume all screening functions at national airports. Section 101(g)(2) then provided that one way the government could perform that obligation was to assume the "rights and responsibilities" of contracts between airlines and screening service providers. If assuming "rights and responsibilities" is read to mean solely that the

government would provide screening services at national airports, as Huntleigh argues, then section 101(g)(2) served merely to reemphasize the obligation that section 101(g)(1) had already created. Under these circumstances, the provision would be redundant, which would be an illogical result. Accordingly, like the Court of Federal Claims, the government concludes that the only reading of the statute that preserves the distinction in language between the two sub-sections is that in which the government was required to pay compensation only when it actually assumed the contracts of private contractors. The government emphasizes that Huntleigh concedes that there was no such assumption of any of Huntleigh's security screening contracts.

B.

The Court of Federal Claims did not err in holding that Huntleigh was not entitled to compensation under ATSA section 101(g)(2). The language of section 101(g)(2) is clear. The obligation to pay compensation only arose if TSA "assume[d] the rights and responsibilities of an air carrier or foreign air carrier contract." The way one assumes the "rights and responsibilities" of a contract is to step into the shoes of the parties to the contract. In other words, section 101(g)(2) required compensation only when TSA actually stepped into the shoes of a party providing security screening services to an airline under a contract. Huntleigh concedes that TSA never did that in the case of any of its contracts. In addition, we agree with the

government that Huntleigh's reading of the statute-under which compensation was due when TSA took over security at airports but did not step into Huntleigh's shoes under any of its contracts-renders section 101(g)(2) redundant. The reading of a statute that produces such a result is disfavored. *See Clark v. United States*, 322 F.3d 1358, 1365 (Fed.Cir.2003); *see also United States v. Alaska*, 521 U.S. 1, 59, 117 S.Ct. 1888, 1918, 138 L.Ed.2d 231 (1997). In sum, section 101(g)(2) did not require that the government compensate Huntleigh for its assumption of screening functions at national airports.

We also are not persuaded by Huntleigh's alternative argument that the government effectively assumed Huntleigh's contracts. Huntleigh notes that internal TSA memoranda speak of "assuming" screening contracts and that the Under Secretary of Transportation himself referred to "assuming" contracts in testimony before Congress. However, such isolated instances, wherein agency representatives may have inadvertently used the term "assume" without contemplating its legal significance, do not give us a reason to adopt a reading of ATSA that is inconsistent with its proper construction.

Appendix A

CONCLUSION

Because ATSA did not effect the taking of Huntleigh's property, but merely frustrated its business interests, and because Huntleigh is not entitled to compensation under section 101(g)(2) of ATSA, we affirm the decision of the Court of Federal Claims.

AFFIRMED

COSTS

Each party shall bear its own costs.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED MARCH 15, 2007

UNITED STATES COURT OF FEDERAL CLAIMS

No. 03-2670C.

HUNTLEIGH USA CORPORATION,

Plaintiff,

v.

The UNITED STATES,

Defendant.

March 15, 2007.

OPINION

MARGOLIS, Senior Judge.

This case is before the Court following a four-day trial in November 2006. After post-trial briefing, the Court heard closing arguments on February 27, 2007. Plaintiff Huntleigh USA Corporation ("Huntleigh") performed passenger and baggage screening at airports across the country before those functions were federalized in 2002 pursuant to the Aviation and Transportation Security Act, Pub.L. No. 107-71, 115 Stat. 597 (2001), ("ATSA" or "the Act"). Huntleigh filed suit against the defendant, the United States, on two

claims. Count I alleges that when the Transportation Security Administration ("TSA") federalized airport screening, the government violated the Fifth Amendment's Takings Clause by taking Huntleigh's screening contracts, as well as the goodwill and going-concern value of its security screening business, without just compensation.[1] Complaint at ¶ 44. Count II alleges that defendant violated ATSA § 101(g) by failing to pay "adequate compensation" for Huntleigh's security screening contracts. Complaint at ¶ 46. Huntleigh claims damages totaling between $151,117,026 and $201,252,328. The facts are discussed in detail in the Court's previous decisions in this case, *Huntleigh USA Corp. v. United States*, 63 Fed.Cl. 440 (2005) ("*Huntleigh I*") and 65 Fed.Cl. 178 (2005) ("*Huntleigh II*"), and they are summarized below.

In *Huntleigh I* and *Huntleigh II*, the Court made preliminary determinations as to both fact and law. Takings cases, however, are highly fact-intensive, and the Court stated that it was necessary to develop a full factual record before making an ultimate decision. With the benefit of a complete record and a review of the applicable law, the Court has reached some different

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1. Although Huntleigh at times made reference to tangible, personal property (such as office furniture and uniforms) that also might have been taken, these items were not mentioned in Huntleigh's post-trial brief. Huntleigh offered no evidence at trial as to their value, and they are the subject of a separate, administrative action between Huntleigh and the defendant. Trial Transcript ("Tr.") 192. As such, the Court will not consider such property in the instant litigation.

conclusions than in the previous opinions. After careful consideration of the evidence presented at trial, as well as the post-trial briefs and oral arguments, the Court finds for the defendant on both counts.

FACTS

The U.S. Congress passed the Aviation and Transportation Security Act in response to the terrorist attacks of September 11, 2001, and the President signed the Act into law on November 19, 2001. It created the new Transportation Security Administration to oversee civil aviation security. The Act required virtually all passenger and baggage screening to be conducted by federal employees within one year. In the interim, ATSA required the new Under Secretary of Transportation for Security (and head of TSA) to take over responsibility for security screening within three months. The Act listed two approaches for transitioning from private to federal screeners: (1) on or after three months from the date of enactment, the Under Secretary could assume the rights and responsibilities of airline contracts for passenger and baggage screening; and (2) not more than 90 days after enactment, an airline could, at the Under Secretary's request, transfer screening contracts to the Under Secretary. Instead of these methods, the TSA negotiated new contracts directly with the screening companies to cover the interim period from February 19, 2002, until federalization was complete on November 19, 2002.

Since 1973, the airlines had been responsible for passenger and baggage screening, pursuant to regulations and guidelines established by the Federal Aviation Administration. Tr. 426. Most airlines met their security responsibilities by contracting with private companies to conduct screening. Tr. 427. Huntleigh had been providing passenger screening services since at least 1989 and checked baggage screening since 1999. Tr. 30-31, 34. By November 2001, Huntleigh had screening contracts with approximately 75 airlines in about 35 cities. Tr. 85. As a result of ATSA, the airlines terminated their screening contracts with Huntleigh on or about February 17, 2002, and Huntleigh signed interim letter contracts with the TSA to continue providing passenger and baggage screening at locations where Huntleigh already operated until federal employees took over the function. Tr. 84-85, 380, 382-83. Huntleigh earned $235,112,000 from screening revenues in 2002, a significant increase from its $68,983,000 in screening revenues in 2001. Plaintiff's Exhibit Admitted at Trial ("PX") 113-010.

DISCUSSION

I. Takings Claim

The Takings Clause of the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. The Supreme Court has expanded on these 12 words to declare that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people

alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). Beyond this simple principle, however, there is no formula for determining when a taking has occurred, only "ad hoc, factual inquiries" for each case. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). With regard to regulatory takings, the framework for these inquiries has been defined by the analysis in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), and *Penn Central, Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Before a court can reach any of these analyses as to whether a compensable taking of private property occurred, however, it must first address the threshold issue of whether the claimant possessed a legally protected property interest at the time of the alleged taking. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1212-13 (Fed.Cir.2005). Although Huntleigh may have been injured, it has not alleged a taking of private property under the Fifth Amendment.

In *Huntleigh I*, this Court held that "mere engagement in a particular business activity is not property protected by the Fifth Amendment," and Huntleigh cannot recover for damage to "its *right to engage in the business of passenger and baggage screening.*" 63 Fed.Cl. at 444 (emphasis in original).

Huntleigh argues that it is not claiming a taking of its right to operate its screening business. Instead, it alternatively describes the relevant property as its "business assets, including its regularly renewed screening contracts, goodwill and going concern value" and its "entire screening business." *E.g.*, Pl. Brief at ¶ 104, 109. Regardless of the label, the property Huntleigh described in its evidence at trial is not subject to compensation under the Fifth Amendment.

Huntleigh's claim is similar to that in *NL Industries, Inc. v. United States.* In that case, the plaintiff did not have a compensable property interest in the physical plant and systems it had developed for transporting spent nuclear fuel, which were rendered valueless when a change in U.S. policy resulted in a moratorium on the license application of the reprocessing plant with which the plaintiff had contracted. 12 Cl.Ct. 391, 398 (1987), *aff'd* 839 F.2d 1578 (Fed.Cir.1988), *cert. denied* 488 U.S. 820, 109 S.Ct. 63, 102 L.Ed.2d 41 (1988). The Court found in *NL Industries* that the regulatory scheme that allowed the agency to deny the license to the reprocessing plant was in place before the plaintiff entered the market. *Id.* Whether the plaintiff could have or should have anticipated the particular regulatory decisions at issue was irrelevant. *Id.* Likewise, when Huntleigh entered the security screening business, it contracted with the airlines pursuant to security regulations issued by the government. Plaintiff's own aviation security expert admitted at trial that the federal government retained the right to change those regulations. Tr. 492. Before the Fall of 2001, both the

Congress and executive branch entities had publicly discussed the possibility of changing the aviation screening paradigm, to include federalizing the screening functions and workforce. *See generally*, PX 359 (discussing the history of federal aviation security studies). It is immaterial that Huntleigh did not anticipate the specific policy shifts that occurred after the terrorist attacks of September 11, 2001, or deem federalization likely, because the regulatory scheme allowing those changes was already in place.

In another license case, the Federal Circuit's recent decision in *Colvin Cattle Co. v. United States* also is instructive. The court declined to find a constitutionally-protected property interest when the only beneficial use of the property was destroyed by the government's refusal to grant cattle grazing rights to a ranch owner. 468 F.3d 803, 808 (2006). Because the ranch never possessed grazing rights as a stick in the bundle of property rights it had, the fact that the denial of grazing rights rendered its water rights worthless and diminished the value of its ranch, did not support a takings claim. *Id.* Similarly, Huntleigh is attempting to claim a taking of its contracts and screening business based on the government's interference with its right to engage in the screening business-a right that Huntleigh never possessed because its contracts with the airlines were always subject to the security regulations the government imposed on the airlines. *See* Tr. 130-31, 151-52. Huntleigh's value may have been diminished after ATSA was enacted, but as these cases demonstrate, not every loss of value triggers constitutionally-mandated compensation.

Appendix B

With regard to Huntleigh's screening contracts, the government's actions amount, at most, to frustration of purpose rather than a taking. Lawful government action that renders a contract impossible to perform does not amount to a taking of the contract. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 511, 43 S.Ct. 437, 67 L.Ed. 773 (1923) (government requisition of steel, preventing the steel producer from honoring its contract, frustrated customer's contract with the steel producer, but was not a taking).

Huntleigh's former and current presidents and Chief Executive Officers testified at trial that all of Huntleigh's screening contracts with the airlines contained a clause that gave either party the right to terminate the contract in compliance with its specified notice provisions. Tr. 54, 199-200, 228. They testified that the notice requirements were usually 30, 60, or 90 days, Tr. 196, 228, with the vast majority requiring 30 days notice. PX 13-59. The airlines terminated these contracts with Huntleigh as a result of ATSA, Tr. 84, but Huntleigh did not consider the terminations to be a breach and did not sue any of the air carriers for breach of contract. Tr. 186-87. The airlines were within their rights to terminate the screening contracts at any time, for any reason or no reason. Tr. 199-200. The government did not interfere with these contracts.

The airlines terminated the contracts because they no longer needed Huntleigh's services when the federal government took over the screening functions covered by the contracts. Huntleigh no longer had a customer

for its services. Relying on *Omnia*, the Federal Circuit has declared that "frustration of a business by loss of a customer was not a taking" of private contracts. *NL Industries, Inc. v. United States*, 839 F.2d 1578, 1579 (Fed.Cir.1988). Like the airlines in Huntleigh, a contracting party in *NL Industries* was unable to fulfill its contract obligations because of a government policy decision. *Id.*

The Federal Circuit also found frustration of purpose rather than a taking when aviation restrictions in response to the terrorist attacks of September 11, 2001, interfered with the operation of a business. Specifically, a heliport operator in Washington, D.C., was forced to close the only business permitted under its lease when the Federal Aviation Administration banned commercial aircraft from the area that included the heliport. *Air Pegasus*, 424 F.3d at 1209-10. The regulations merely frustrated the plaintiff's business because they did not apply to the heliport itself, but to the third parties who sought to fly in and out of the facility. *Id.* at 1216. Likewise, ATSA did not address Huntleigh or the other screening companies; it merely moved the responsibility for aviation security from the airlines to the newly-created TSA. Huntleigh relies heavily on *Cienega Gardens v. United States* to rebut the government's argument on frustration of purpose. However, ATSA was "legislation targeted at some public benefit, which incidentally affect[ed] contract rights, not, as in [*Cienega Gardens*], legislation aimed at the contract rights themselves in order to nullify them." *See* 331 F.3d 1319, 1335 (Fed.Cir.2003) (legislation

preventing property owners from pre-paying mortgages in accordance with their contract terms to keep the property within federal, low-cost housing programs resulted in a taking because it kept the contracts alive for the government's benefit).

Finally, Huntleigh seeks compensation under *Kimball Laundry Co. v. United States* for damage to its goodwill and going-concern value. In that case, the Supreme Court held that the property owners could recover going-concern value as an element of the just compensation awarded for the government's temporary takeover of their business during World War II. 338 U.S. 1, 8, 16, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949). There was never a question of whether a taking had occurred, but only the amount and method for determining just compensation. *Id.* at 3, 8, 69 S.Ct. 1434. In contrast, the government in the instant case has not taken Huntleigh's underlying property, the screening contracts, so there is no basis for awarding damages for the associated goodwill or going-concern value.

In summary, Huntleigh did not possess a compensable property interest under the Fifth Amendment, and the Court's analysis ends there. Without a property interest, there can be no taking, and the Court need not address the *Lucas* or *Penn Central* requirements.

Appendix B

II. Statutory Claim

Huntleigh also asserts that, aside from its takings claim, it is entitled to "adequate compensation" under the Aviation and Transportation Security Act. It argues that "adequate compensation" in the Act can be interchangeable with "just compensation" in the Fifth Amendment context, and Congress therefore intended the phrase "adequate compensation" to create a statutory right to takings compensation without the traditional, common law takings requirements. Pl. Brief at ¶ 147. The Court turns to traditional rules of statutory interpretation to determine if Huntleigh is entitled to compensation under § 101(g) of ATSA.[2]

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2. (g) TRANSITION PROVISIONS.–

(1) SCHEDULE FOR ASSUMPTION OF CIVIL AVIATION SECURITY FUNCTIONS.–Not later than 3 months after the date of enactment of this Act, the Under Secretary of Transportation for Security shall assume civil aviation security functions and responsibilities under chapter 449 of title 49, United States Code, as amended by this Act, in accordance with a schedule to be developed by the Secretary of Transportation, in consultation with air carriers, foreign air carriers, and the Administrator of the Federal Aviation Administration. The Under Secretary shall publish an appropriate notice of the transfer of such security functions and responsibilities before assuming the functions and responsibilities.

(Cont'd)

(Cont'd)

(2) ASSUMPTION OF CONTRACTS.–As of the date specified in paragraph (1), the Under Secretary may assume the rights and responsibilities of an air carrier or foreign air carrier contract for provision of passenger screening services at airports in the United States described in section 44903, subject to payment of adequate compensation to parties to the contract, if any.

(3) ASSIGNMENT OF CONTRACTS.–

(A) IN GENERAL.–Upon request of the Under Secretary, an air carrier or foreign air carrier carrying out a screening or security function under chapter 449 of title 49, United States Code, may enter into an agreement with the Under Secretary to transfer any contract the carrier has entered into with respect to carrying out the function, before the Under Secretary assumes responsibility for the function.

(B) SCHEDULE.–The Under Secretary may enter into an agreement under subparagraph (A) as soon as possible, but not later than 90 days after the date of enactment of this Act. The Under Secretary may enter into such an agreement for one 180-day period and may extend such agreement for one 90-day period if the Under Secretary determines it necessary.

(4) TRANSFER OF OWNERSHIP.–In recognition of the assumption of the financial costs of security screening of passengers and property at airports, and as soon as practical after the date of enactment of this Act, air carriers may enter into agreements

(Cont'd)

Appendix B

Section 101(g)(1), "SCHEDULE FOR ASSUMPTION OF CIVIL AVIATION SECURITY FUNCTIONS," states that the new Under Secretary for Transportation Security "*shall* assume civil aviation security functions and responsibilities" within three months of the Act's November 19, 2001, enactment date. § 101(g)(1), 115 Stat. 603 (emphasis added). The next section, "ASSUMPTION OF CONTRACTS," declares that "the Under Secretary *may* assume the rights and responsibilities of an air carrier or foreign air carrier contract for provision of passenger screening services at airports." *Id.* at § 101(g)(2) (emphasis added). This assumption could occur "as of" the date in § 101(g)(1), meaning at or on February 19, 2002. *See* 115 Stat. 603; Webster's Third New International Dictionary (Unabridged) 129 (2002). Finally, "not later than 90 days" after the November 19, 2001, enactment date,

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(Cont'd)

> with the Under Secretary to transfer the ownership, at no cost to the United States Government, of any personal property, equipment, supplies, or other material associated with such screening, regardless of the source of funds used to acquire the property, that the Secretary determines to be useful for the performance of security screening of passengers and property at airports.
>
> (5) PERFORMANCE OF UNDER SECRETARY'S FUNCTIONS DURING INTERIM PERIOD.–Until the Under Secretary takes office, the functions of the Under Secretary that relate to aviation security may be carried out by the Secretary or the Secretary's designee.

§ 101(g)(3), "ASSIGNMENT OF CONTRACTS," states that an air carrier may, at the request of the Under Secretary, make an agreement to transfer to the Under Secretary any contract for passenger and baggage screening. *See* 115 Stat. 604.

By using both "shall" and "may," the clear implication of these provisions is that the Under Secretary was required to take over responsibility for passenger and baggage screening within three months, but the assumption or assignment of contracts was discretionary–i.e., it was a possible means for accomplishing the mandate of the Act. *See Huston v. United States*, 956 F.2d 259, 262 (Fed.Cir.1992). Plaintiff cites the legislative history to argue that the Under Secretary was required to assume Huntleigh's screening contracts. Pl. Brief at ¶ 62. Yet, on this particular point, the Act's language is clear and unambiguous. As such, examination of legislative history is unnecessary and inappropriate, and the Court will not stray from the plain language of the statute. *Messick ex rel. Estate of Kangas v. United States*, 70 Fed.Cl. 319, 324 (2006); *Fluor Enters., Inc. v. United States*, 64 Fed.Cl. 461, 479 (2005) (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983)).

In *Huntleigh I*, this Court assumed as true for the purposes of determining jurisdiction, plaintiff's allegations that the contracts had been assumed, thereby triggering the Act's "adequate compensation" requirement. *See* 63 Fed.Cl. at 450-51; *Huntleigh II*,

65 Fed.Cl. at 180. In contrast, the current analysis centers on whether the government actually assumed the contracts as a matter of law, as allowed under the statute. The issue fundamentally turns on the meaning of "assume" in the Act. Black's Law Dictionary defines "assumption" as "[t]he act of taking (esp. someone else's debt or other obligation) for or on oneself; the agreement to so take." Black's Law Dictionary (8th ed.2004). The TSA did not assume Huntleigh's contracts by taking on the airlines' obligations because, among other reasons, the contracts differed greatly and contained provisions that were inappropriate for federal government contracts. PX 292; Tr. 345-47. Instead, the airlines terminated their contracts with Huntleigh and the other screening companies on or about February 17, 2002, and the TSA entered into new contracts with the screening companies for the interim period before complete federalization occurred. *Id.*

When making its legal conclusions, the Court will not be swayed by agency statements, however official they might be. The TSA's March 2003 report to the Congress on compliance with ATSA stated that it had "assumed the airlines' passenger screening company contracts." PX 298-010. The Under Secretary of Transportation for Security had made a similar statement in January 2002, when informing the Congress about the TSA's plans for following the Act. PX 297-003. Huntleigh relies on these official pronouncements, as well internal TSA memoranda from late 2001 and early 2002, to argue that the TSA assumed the contracts. Pl. Brief at ¶ 63-66. Whether the TSA

assumed the contracts is a matter of law for the Court to decide, however, and a statement, even by a party, that something "is so" does not make it legally true.

Huntleigh argues that the TSA's eventual takeover of Huntleigh's screening responsibilities amounts to an assumption of its contracts under the Act, even though the government did not assume Huntleigh's contracts with the airlines in the strict, legal sense. The language of the Act undermines this assertion. Section 101(g)(1) requires the assumption of "civil aviation security *functions and responsibilities.*" 115 Stat. at 603 (emphasis added). In contrast, § 101(g)(2), "ASSUMPTION OF CONTRACTS," allows the Under Secretary to "assume the rights and responsibilities of an air carrier . . . *contract* for provision of passenger screening services . . . subject to payment of adequate compensation to parties *to the contract,* if any." *Id.* at 603-04 (emphasis added).

In interpreting a statute, a court must attempt to give effect to every word and clause. *Mudge v. United States,* 308 F.3d 1220, 1228 (Fed.Cir.2002); *Perez v. Merit Sys. Prot. Bd.,* 85 F.3d 591, 594 (Fed.Cir.1996). The court also must avoid interpretations that make a word or clause "inconsistent, meaningless, or superfluous." *Messick,* 70 Fed.Cl. at 324; *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001). Following these tenets, this Court must give significance to the Congress' use of the word "contract" in § 101(g)(2), and the absence of that word in § 101(g)(1). In the first section, the Act requires assumption of

"functions and responsibilities," but not necessarily contracts. In the second, it specifically permits assumption of contracts for adequate compensation of the contract parties. To adopt Huntleigh's interpretation would ignore the Congress' deliberate insertion of "contract" in § 101(g)(2) and render the word superfluous. As a result, this Court must conclude that the Congress intended § 101(g)(2) to apply only if the government chose to assume screening company contracts as defined by Black's Law Dictionary-taking the airlines' contract obligations onto itself. That did not happen, and Huntleigh has not asserted that it did. Plaintiff's counsel even admitted at the post-trial hearing that the government "did not directly assume those contracts." Tr. Feb. 27, 2007 at 25. The language of § 101(g)(3) also does not apply because the airlines never entered into any agreements to transfer contracts to the government. The government did not assume Huntleigh's contracts under the Act, and Huntleigh therefore is not entitled to compensation.

CONCLUSION

For the reasons stated above, it is hereby ORDERED that the Clerk of the Court shall dismiss the complaint and enter judgment in favor of the defendant. Each side to pay its own costs.

APPENDIX C — DENIAL OF MOTION FOR SUMMARY JUDGMENT AND ORDER DATED OCTOBER 12, 2006

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Docket No.: 03-2670C

HUNTLEIGH USA CORP.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Courtroom 6
National Courts Building
717 Madison Place NW
Washington, D.C.

* * *

THE COURT: Have a seat. Thank you very much for the helpful oral argument and the voluminous briefs and appendices. This is my opinion.

Many of the legal and factual issues raised in Defendant's motion for summary judgment were considered in this Court's previous denial of Defendant's

motion to dismiss, and they're reported at 63 Fed. Cl. 440, decided 2005, and the motion to reconsider decided at 65 Fed. Cl. 178, decided in 2005.

Defendant again raises many of the same issues in the present motion. For the same reasons previously stated in response to Defendant's motions as to those issues, the motion for summary judgment is denied.

In particular, there are triable issues of material fact as to whether *Lucas* or *Penn Central* provides the applicable test for determining whether a taking has occurred. And Defendant's assertion that Huntleigh suffered no damages also raises disputed issues of material fact that must be resolved at trial.

In addition, if the Aviation and Transportation Security Act was breached, Plaintiff is entitled to a trial to determine damages. And for all these reasons, Defendant's motion for summary judgment is denied.

There are simultaneous memorandum of contentions of law and fact due on Monday, the 16th. The pretrial conference is set in Court on October 26 at 2 p.m. And our trial over a period of six days is set for November 13 through the 20th starting at 9:30 in the morning. I believe that accurately reflects our future schedule.

* * * *

Appendix C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 03-2670C

(Filed: October 12, 2006)

HUNTLEIGH USA CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

ORDER

On October 12, 2006, a hearing was held in open court on Defendant's motion for summary judgment, filed May 30, 2006. For the reasons stated in court, Defendant's motion for summary judgment is **DENIED**.

s/ Lawrence S. Margolis
LAWRENCE S. MARGOLIS
Senior Judge, U.S. Court of Federal Claims

APPENDIX D — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED APRIL 21, 2005

UNITED STATES COURT OF FEDERAL CLAIMS

No. 03-2670C.

HUNTLEIGH USA CORPORATION,

Plaintiff,

v.

The UNITED STATES,

Defendant.

April 21, 2005.

OPINION

MARGOLIS, Senior Judge.

Before the Court is defendant's January 31, 2005 Motion for Reconsideration, filed pursuant to R. Ct. Fed. Cl. 59(a)(1) ("RCFC"). The motion arises from the January 7, 2005 opinion denying defendant's motion to dismiss plaintiff's complaint. *See Huntleigh USA Corporation v. United States,* 63 Fed.Cl. 440 (2005). There, plaintiff asserted that defendant violated the Takings Clause of the Fifth Amendment to the United States Constitution when it federalized airport security

at all domestic commercial airports, thereby displacing Huntleigh, who had previously provided these services to various air carriers. Further, plaintiff alleged that defendant violated § 101(g) of the Aviation and Transportation Security Act, P.L. No. 107-71, 115 Stat. 597 ("ATSA") when it refused to provide plaintiff with adequate compensation for the loss of its private screening contracts. The Court denied defendant's motion to dismiss both counts of plaintiff's claim. Defendant now seeks reconsideration of the Court's ruling. After careful consideration of the entire record, the Court denies the motion.

DISCUSSION

Motions for Reconsideration are governed by RCFC 59 and are granted at the sole discretion of the Court. *AT & T Corp. & Subsidiaries v. United States*, 63 Fed.Cl. 209, 211 (2004). "[A] motion for reconsideration is improper when based upon 'the sole ground that one side or the other is dissatisfied with the conclusions reached by the court, otherwise the losing party would generally, if not always, try his case a second time, and litigation would be unnecessarily prolonged.'" *Id.* at 211-212 (quoting *Roche v. District of Columbia*, 18 Ct.Cl. 289, 290, 1800 WL 1263 (1883)). To sustain its burden, the movant must show: (1) that an intervening change in the controlling law has occurred; (2) that previously unavailable evidence is now available; or (3) that the motion is necessary to prevent manifest injustice. *Fru-Con Const. Corp. v. United States*, 44 Fed.Cl. 298, 301 (1999). "The movant may not merely recapitulate

'cases and arguments considered by th[e] court before rendering its original decision.' " *Id.* (quoting *Carteret Savings Bank, F.A. v. Shushan*, 721 F.Supp. 705, 706 (D.N.J.1989)).

Defendant alleges three grounds for reconsideration: (1) that the Court is mistaken in finding that plaintiff's complaint alleges a constitutional taking of its contracts; (2) that plaintiff enjoyed no reasonable expectation of continuing in the screening business because it had no bargained-for rights to the continuance of its contractual relationships with the airlines; and (3) that plaintiff has failed to state a claim for relief because the plaintiff did not allege that the government assumed any of plaintiff's contracts with the airlines.

The defendant presents no new facts nor arguments in its motion for reconsideration. The government argues that plaintiff never alleged that the government took its contracts or tangible assets and that by finding that plaintiff sufficiently alleged a taking of its contracts and tangible assets, the Court was in error. The government asserts that Huntleigh failed to state a constitutional takings claim, as a matter of law, and that a taking of contracts is not the same as a mere impairment of contractual relations. Plaintiff, on the other hand, asserts that whether a regulation goes too far in impairing a contract requires a careful analysis of the *Penn Central Transp. Company v. United States* factors at trial. *See* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

This issue was addressed in the January 7, 2005 opinion where this Court stated that "[m]ore than rewriting the contracts between Huntleigh and the nation's airlines, the government has taken over Huntleigh's position as the contractor, and has created for itself a sweeping monopoly over the entire industry." *Huntleigh*, 63 Fed.Cl. at 447-448. This statement reflects the Court's opinion, at that time, that the degree to which the government took Huntleigh's business necessitates a *Penn Central* factual analysis at trial. The Court notes that for purposes of the motion to dismiss, the Court assumed the facts alleged by the plaintiff were true. Discovery and trial may lead to a later contrary finding.

The government's assertion that Huntleigh failed to allege that its contracts were taken was also addressed in the January 7, 2005 opinion. There, this Court stated:

> Count I of Huntleigh's complaint alleges that the government took the goodwill and going-concern value of its business and does not mention contracts. However, throughout the complaint Huntleigh asserts that it lost its screening contracts as a direct result of the government's actions. Because a court must construe the allegations in the complaint broadly and in plaintiff's favor in considering a motion to dismiss, this Court finds that Huntleigh's complaint sufficiently alleges a taking of both its screening contracts and its goodwill and going-concern value. *See First Hartford Corp. Pension Plan & Trust v.*

> *United States*, 194 F.3d 1279, 1287 (Fed.Cir.1999) ("Because granting [a motion to dismiss] summarily terminates the case on its merits, courts broadly construe the complaint.") (quoting *Ponder v. United States*, 117 F.3d 549, 552-53 (Fed.Cir.1997)).

Huntleigh, 63 Fed.Cl. at 443, FN 1.

In addition, this Court held that *Rith Energy v. United States*, 44 Fed.Cl. 108 (1999), was distinguishable from the present case because *Rith Energy* involved claimants who were found to present a danger to the public, whereas plaintiff, on the other hand, had asserted that it did not present a danger to the public. *Huntleigh*, 63 Fed.Cl. at 448. Defendant asserts that by ruling that the performance of a screening company is a relevant question of fact, the Court has "extend[ed] . . . Huntleigh the backdoor opportunity to use the judicial system to essentially challenge Congress' national security decision to federalize security screening." Def's Mtn. For Reconsideration at 7. This is not so, because, for the purposes of a motion to dismiss, the Court is required to accept plaintiff's assertions as true. Further, the comparison of Huntleigh to *Rith Energy* was made under the first prong of the *Penn Central* takings analysis, a purely factual analysis. *See Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646 (stating that the takings analysis is an "ad hoc, factual inquir[y]"). This Court, in its January 7, 2005 opinion, stated: "*[A]t this stage of the proceeding*, this Court does not consider the nature of the government's action to have been an appropriate

exercise of police power. Rather, this Court holds that the nature of the government's action is the type that *may* require compensation, *such that plaintiff should have the opportunity to present evidence.*" 63 Fed.Cl. at 449 (emphasis added). By denying defendant's motion to dismiss, the Court has not made a final determination regarding Huntleigh not being a danger to the community, and only after discovery and a trial will plaintiff's assertion be proved or disproved.

Finally, the government suggests that by failing to dismiss Count II of plaintiff's complaint, the Court prematurely and without adequate support made a finding regarding Government liability on Count II. The Court held that the government assumed plaintiff's contracts when, at the end of the interim period, it transferred all of plaintiff's security responsibilities to TSA personnel. *Huntleigh*, 63 Fed.Cl. at 451. Again, the Court assumed for the purposes of the motion to dismiss, plaintiff's allegations were true. Later factual development and trial could lead to a different conclusion. The Court stated in its January 7, 2005 opinion that the "issues in Count II clearly necessitate the development of a factual record." *Id.*

The government has failed to meet the standards required to prevail on a motion for reconsideration. Plaintiff is correct that: (1) the government has not suggested an intervening change in the controlling law; (2) the discovery of previously unavailable evidence is irrelevant at the dismissal stage; and (3) the government has failed to argue that its motion for reconsideration is

necessary to prevent manifest injustice. The government has failed to sustain its burden of proof on any of the standards. *See e.g., CW Gov't Travel, Inc. v. United States,* 63 Fed.Cl. 459, 462 (2005).

CONCLUSION

For the foregoing reasons, the Court DENIES the defendant's motion for reconsideration.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED JANUARY 7, 2005

UNITED STATES COURT OF FEDERAL CLAIMS

No. 03-2670C.

HUNTLEIGH USA CORPORATION,

Plaintiff,

v.

The UNITED STATES,

Defendant.

Jan. 7, 2005.

OPINION

MARGOLIS, Senior Judge.

This action is before the Court on defendant's motion to dismiss Counts I and II of plaintiff's complaint. Plaintiff, Huntleigh USA Corporation ("Huntleigh"), filed a complaint against defendant, the United States, alleging two counts. First, plaintiff alleges that defendant violated the Takings Clause of the Fifth Amendment to the United States Constitution when it federalized airport security at all domestic commercial airports thereby displacing Huntleigh, who had

previously provided these services to various air carriers. Second, plaintiff alleges that defendant violated § 101(g) of the Aviation and Transportation Security Act, Pub.L. No. 107-71, 115 Stat. 597 (the "Act") (codified primarily in sections of Title 49 of the United States Code), which according to plaintiff requires the Transportation Security Administration ("TSA") to pay adequate compensation to private security screening companies for the loss of their contracts. Plaintiff contends that defendant violated § 101(g) of the Act when it refused to provide plaintiff with adequate compensation for the loss of its private screening contracts. Specifically, defendant contends that Count I of the complaint should be dismissed because plaintiff has failed to state a claim upon which relief may be granted. Additionally, defendant contends that Count II of the complaint should be dismissed because the court lacks jurisdiction or, in the alternative, because plaintiff has failed to state a claim upon which relief may be granted. After careful consideration of the briefs and oral argument, the Court denies defendant's motion to dismiss Counts I and II.

FACTS

On November 19, 2001, in response to the September 11, 2001 hijackings, the United States Congress enacted the Aviation and Transportation Security Act, Pub.L. No. 107-71, 115 Stat. 597. The Act created the Transportation Security Administration and charged it with carrying out, among other things, civil aviation security functions, including security screening

operations for passenger air transportation. Pub.L. No. 107-71, § 101(a), 115 Stat. 597, 597-602. The Act shifted the responsibility for screening passengers and property boarding aircrafts from private companies to TSA. 49 U.S.C. § 44901(a). To carry out this shift, the Act sets forth various deadlines that TSA was required to meet. Of importance to this action, TSA was required to: (1) assume civil aviation security functions and responsibilities not later than three months after the date of enactment of the Act (February 19, 2002), § 101(g)(1), and (2) have a sufficient number of federalized screeners in place to screen all passengers and property that would be boarding aircrafts at all 429 domestic commercial airports not later than one year after the date of enactment of the Act (November 19, 2002), § 110(c)(1). Thus, TSA had a nine-month period to transition from private screeners to federal screeners.

The Act set out two approaches that TSA could use in transitioning from private to federalized airport security screening. First, TSA could assume the rights and responsibilities of air carriers under existing screening contracts. § 101(g)(2). Second, TSA could obtain, through agreements with air carriers, the assignment of existing screening contracts. § 101(g)(3). Thus, if TSA chose to utilize either of these two approaches, it would essentially be taking the place of the air carriers with respect to their contracts with private screening companies. If TSA chose to use the second approach, the Act required that the agreements be entered into not later than 90 days after the date of enactment. Further, the Act mandated that the

agreements be for one 180-day period, which could be extended for one 90-day period if the Under Secretary determined that such an extension was necessary. § 101(g)(3)(B).

TSA ultimately chose a different approach. Under TSA's approach, private security companies submitted bids for interim contracts with the government, which remained in effect for up to the nine-month transition period.

Huntleigh is a private security company. Since 1988, Huntleigh has provided passenger and baggage screening at airports throughout the United States. At the time the Act was passed, Huntleigh had contracts with eight major airlines, and a number of smaller air carriers, to provide passenger and baggage screening services at 35 airports across the United States. Huntleigh's contract with each airline consisted of a core agreement, with addendums for each separate airport location. These contracts generally had a term of three years, with a provision for automatic renewal, which the airlines often invoked.

In July 2002, Huntleigh received notices from the government informing it that TSA would be replacing Huntleigh's screening checkpoints one by one. On July 23, 2002, the government terminated the first Huntleigh security checkpoint. Over the next four months, TSA terminated all of Huntleigh's additional checkpoints. By November 2002, TSA had fully federalized airport security screening. As a result, Huntleigh alleges it has

been forced out of the airport security industry, but continues to provide some non-security related services to air carriers and airports, such as skycap services, baggage handling, and janitorial services. On November 14, 2003, Huntleigh filed a complaint with this Court.

DISCUSSION

I. *Standard of Review*

Count I of Huntleigh's complaint alleges that by federalizing airport security at all domestic commercial airports, the federal government has taken Huntleigh's security business for public use without providing just compensation, in violation of the Fifth Amendment to the United States Constitution. Specifically, Huntleigh contends that the government's actions constituted a taking of its (1) contracts[1] and (2) goodwill and going-concern value.

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1. Count I of Huntleigh's complaint alleges that the government took the goodwill and going-concern value of its business and does not mention contracts. However, throughout the complaint Huntleigh asserts that it lost its screening contracts as a direct result of the government's actions. Because a court must construe the allegations in the complaint broadly and in plaintiff's favor in considering a motion to dismiss, this Court finds that Huntleigh's complaint sufficiently alleges a taking of both its screening contracts and its goodwill and going-concern value. *See First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1287 (Fed.Cir.1999) ("Because granting [a motion to dismiss] summarily terminates the case on its merits, courts broadly construe the complaint.") (quoting *Ponder v. United States*, 117 F.3d 549, 552-53 (Fed.Cir.1997)).

Appendix E

Count II of the complaint alleges that by failing to pay adequate compensation to Huntleigh for the loss of its contracts with the airlines, the TSA has violated § 101(g) of the Act. Specifically, Huntleigh contends that it is entitled to the fair market value of the contracts based on their initial term as well as compensation for the delay in payment from the time the contracts were taken over by the government.

When considering a motion to dismiss a claim under RCFC 12(b)(6), a court must accept as true all well-pled factual allegations and draw all reasonable inferences in plaintiff's favor. *DeMarco Durzo Dev. Co. v. United States,* 60 Fed.Cl. 632, 635 (2004) (citing *Godwin v. United States,* 338 F.3d 1374, 1377 (Fed.Cir.2003)). Such a motion should be granted only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Therefore, the Court must determine if, given plaintiff's allegations, it is beyond doubt that there are no set of circumstances that would entitle plaintiff to relief for its claims that the government took its screening contracts, goodwill and going-concern value without just compensation.

"Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472, 123

S.Ct. 1126, 155 L.Ed.2d 40 (2003) (citations omitted). The Tucker Act contains *444 such a waiver, and gives this Court jurisdiction over claims against the United States that seek money damages and are "founded either upon the Constitution, or any Act of Congress." 28 U.S.C. § 1491(a)(1). Thus, plaintiff must point to some constitutional or statutory provision that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *White Mountain Apache Tribe*, 537 U.S. at 472, 123 S.Ct. 1126 (quoting *United States v. Mitchell*, 463 U.S. 206, 217, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)). In this case, plaintiff's claim for monetary damages is based on § 101(g) of the Aviation and Transportation Security Act.

II. *Count I-Takings Claim*

"Whether or not a taking has occurred is a question of law based on factual underpinnings." *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed.Cir.2003) (citing *Base Enters. Prod. Co. v. United States*, 133 F.3d 893, 895 (Fed.Cir.1998)). In analyzing a takings claim a court must undertake three separate inquiries. First, a court must determine whether the subject of the alleged taking is property for purposes of the Takings Clause. If it is, the court must then determine whether the government action constituted a compensable taking, that is, whether the government interference goes "too far." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (laying out a three-factor analysis to assess whether a given regulation goes

"too far" for purposes of the Takings Clause). Finally, if the court finds that a taking has occurred, it must determine the amount of just compensation.

In this case, defendant contends that Huntleigh's takings claim fails to state a claim for two separate reasons: (1) that Huntleigh fails to assert a valid property interest compensable under the Fifth Amendment; and (2) that, even if Huntleigh does have a valid property interest, the government's action in this case did not constitute a compensable taking.

A. Nature of Plaintiff's Claim

As a threshold matter, the Court must determine how to characterize plaintiff's claim. Plaintiff asserts that it has a protected property interest in its business assets, including its long-running contracts with established customers, goodwill, and going-concern value. Plaintiff further alleges that upon passage of the Act, its protected property interest was taken without just compensation. Defendant, on the other hand, asserts that mere engagement in a business activity is not protected property under the Fifth Amendment, and therefore, that a Fifth Amendment taking has not occurred. Thus, the question is whether Huntleigh has alleged that its *business assets* or its *right to engage in the business of passenger and baggage screening* has been taken. Such a distinction is crucial. If the Court were to agree with the government that Huntleigh has alleged nothing more than a taking of its right to engage in a particular business activity, the Court would grant

the government's motion to dismiss. As the government correctly points out, mere engagement in a particular business activity is not property protected by the Fifth Amendment.

Despite the government's attempt to characterize plaintiff's claim, the Court finds that plaintiff has alleged that its business assets were taken, including its contracts, goodwill, and going-concern value. Defendant is mistaken in its characterization of plaintiff's claim, as plaintiff repeatedly states that by federalizing airport security at all the nation's airports, the government has taken its business assets. Accordingly, the Court will analyze whether Huntleigh's business assets are compensable property under the Fifth Amendment.

B. Contracts, Goodwill and Going-Concern Value

Plaintiff alleges that by virtue of the Act, the government has taken its business assets, including its long-term screening contracts, goodwill and going-concern value. The government admits that contracts are property. Therefore, plaintiff's allegation that it had a contractual right to provide screening services to various airlines sufficiently sets forth a property interest. *See Cienega Gardens*, 331 F.3d at 1329-30. The parties dispute, however, whether goodwill and going-concern value are property under the Takings Clause. Plaintiff cites *Kimball Laundry Co. v. United States*, a case where the Army temporarily condemned the plaintiff's laundry plant during World War II. 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949). There, the plaintiff

asserted that it was entitled not only to compensation for the value of the use of its plant and equipment, but also for the "diminution in the value of its business due to the destruction of its 'trade routes.'" *Id.* at 8, 69 S.Ct. 1434. The term "trade routes," explained the court, served as a "general designation both for the lists of customers built up by solicitation over the years and for the continued hold of the Laundry upon their patronage." *Id.* In other words, the Laundry's going-concern value. Thus, the court found that the government was required to compensate the plaintiff for the going-concern value of its laundry business. *Kimball Laundry,* 338 U.S. at 12, 69 S.Ct. 1434.

Defendant argues, however, that going-concern value is only compensable under the Fifth Amendment when the government has *temporarily* taken control of a claimant's tangible business assets. The government also relies on *Kimball Laundry* because the Court held that the Army's temporary, rather than permanent, use of the plaintiff's property was a taking. *Id.* at 12, 69 S.Ct. 1434. The government asserts that when the taking of tangible business assets is permanent, going-concern value does not afford recovery.

This Court is not persuaded by the government's argument. In *Kimball Laundry,* the court found the government's use of the plaintiff's property to be a compensable taking *not* because the use was temporary, but because the use precluded the plaintiff from capitalizing on its trade routes. As the court noted, "[t]he government's temporary taking of the Laundry's

premises could no more completely have appropriated the Laundry's opportunity to profit from its trade routes than if it had secured a promise from the Laundry that it would not for the duration of the Government's occupancy of the premises undertake to operate a laundry business anywhere else in the City of Omaha." *Id.* at 14, 69 S.Ct. 1434. The government asserts that Huntleigh, unlike Kimball Laundry, remains completely free to exploit its intangible assets anyway it wants. However, Huntleigh, like Kimball Laundry, has no alternatives under the Act. Because the Act makes it impossible for Huntleigh to conduct its airport security business at the nation's airports, it cannot simply "adjust" by entering into new contracts nor may it exploit its intangible assets elsewhere. Huntleigh's going-concern value allegedly has been severely diminished by the Act, and the government has been assured that there is no competition from Huntleigh. Like the plaintiff in *Kimball Laundry*, "[t]he owner retains nothing of the going-concern value that it formerly possessed; so far as control of that value is concerned, the taker fully occupies the owner's shoes." *Id.* at 13, 69 S.Ct. 1434.

Further, plaintiff asserts that its situation is similar to *United States v. 0.88 Acres of Land*, 670 F.Supp. 210 (1987). There, the government condemned the defendant's canoe and boat livery with the intention of consolidating all of the area's liveries into one large business. *Id.* at 211. The court held that the government's taking was compensable under the Fifth Amendment, stating where "1) the government intends

to construct facilities in substitution for an existing business; 2) the new business is operated under the government's pervasive regulation; 3) the government creates a monopoly situation and realizes a pecuniary interest by doing so, the government's activity is tantamount to the operation of the ongoing concern which, in turn, comprises a business taking." *Id.* at 213. Plaintiff likens the present case to *0.88 Acres of Land*, asserting that the government intentionally assigned plaintiff's business to itself, depriving plaintiff of the transferable intangible value of its business.

Defendant responds by distinguishing both *Kimball Laundry* and *0.88 Acres of Land* from the present case by asserting that in those cases the government physically seized control of a business, whereas here, the government merely eliminated a market for the plaintiff's commercial services. Defendant argues that the present case is similar to *Southern Counties Gas Co. v. United States*, 141 Ct.Cl. 28, 157 F.Supp. 934 (1958), where the government banned human habitation in a particular area, thereby destroying the demand for the plaintiff's utility services in that area. There, the court held that "the falling off of customers, though caused by the project, was not a taking." *Id.* at 935. The court's rationale was that even though the plaintiff's loss was due to the government's project, the loss was merely consequential, and plaintiff could still serve other customers throughout Southern California.

Huntleigh's loss, which was much greater than merely consequential to the government's action, was

caused by the government's intended taking of its entire business. Here, the specific purpose of the Act was to replace private airport screeners with TSA airport screeners, or as plaintiff alleges, to completely exclude Huntleigh and other private companies from the airport screening business throughout the United States. This Court holds that Huntleigh's loss is more than consequential, and therefore, Huntleigh is entitled to develop a factual record in support of its assertion.

C. Airline Screening-A Highly Regulated Industry

Defendant argues that Huntleigh had no underlying inherent right to engage in airline screening, given the pervasive government regulatory dominance over airline security. Defendant relies upon *Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed.Cir.1993), where the plaintiff, a firearms importer who held a federal license to import and sell firearms, sued the government when it revoked all import licenses for assault rifles. The plaintiff claimed that the revocation of its license constituted a taking. The court found that Mitchell's expectation of selling assault rifles in the United States did not constitute a property right protected under the Fifth Amendment. *Id.* at 216. The court held that because Mitchell voluntarily entered the firearms import business, a governmentally controlled area, Mitchell did not have a property interest in its expectation of selling the assault rifles. *Id.* Here, defendant asserts that Huntleigh had no inherent right to engage in airline screening due to the pervasive government regulatory dominance over airline security. Defendant argues that

by entering the airline screening industry, Huntleigh placed itself in an arena exclusively controlled by government regulation.

In *American Pelagic Fishing Company, L.P. v. United States*, 379 F.3d 1363 (Fed.Cir.2004), the plaintiff alleged a taking in violation of the Fifth Amendment when the government revoked its license to fish in any U.S. fishery within the Exclusive Economic Zone ("EEZ") in the Atlantic Ocean. *Id.* at 1369. The Federal Circuit held that American Pelagic did not have a property interest in its fishing permits. *Id.* at 1374. The court based its decision on *Conti v. United States*, another fishing license case. 291 F.3d 1334 (Fed.Cir.2002). In *Conti*, the court viewed Conti's fishing permit as a revocable license and stated that "no property rights are created in permits and licenses." *Id.* at 1340 (citing *United States v. Fuller*, 409 U.S. 488, 493, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973)).

The government asserts that *American Pelagic* and *Mitchell Arms* apply to the current case because like the fishing industry, there was pervasive government regulatory dominance over airline security at the time Huntleigh entered the airline security business. Defendant maintains that Huntleigh never possessed any inherent right to engage in airline screening independent of the government's regulatory permission, and that while the government has revoked its permission to engage in airline screening, it has not otherwise impaired Huntleigh's going-concern value. The government claims that because Huntleigh remains

free to engage in any other screening or security activities it wishes, it has hardly legislated Huntleigh out of existence.

Huntleigh maintains that even though the industry in which it operated was regulated by the government, it still possesses a compensable property right. Plaintiff acknowledges that prior to the passage of the Act, the government, through the FAA, heavily regulated airport security procedures. Plaintiff's position, however, is that while the government had the right to alter the regulations governing airport security, it had no right to "legislate a private company out of existence." Pl.'s Opp. at 60. Plaintiff relies on *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed.Cir.2003), where the court held that the plaintiff had vested property rights even in "an area voluntarily entered into and one which, from the start, is subject to pervasive Government control." *Id.* at 1330. In *Cienega Gardens*, real estate owners of low-income apartments sued the government when Congress enacted two statutes that abrogated the owners' rights to prepay their forty-year mortgage loans after twenty years. *Id.* at 1323. The plaintiffs argued that by enacting the statutes, the government had taken their property because the laws prevented them from exiting the housing programs after twenty years. The statutes prohibited the plaintiffs from regaining possession and control of their real estate because only extinguishment of their mortgages released the owners from the U.S. Department of Housing and Urban Development's low-rent housing programs. *Id.*

Appendix E

The court in *Cienega Gardens* rejected the government's assertion that the plaintiff could not demonstrate a protected property right "in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control." *Id.* at 1330. The court held that the plaintiffs had vested property interests in the contractual right to prepay and exit the housing programs and thereby regain their normal rights of ownership.

This Court finds a significant difference between *Mitchell Arms* and *American Pelagic*, and the present case. In *Mitchell Arms*, the government's action revoked Mitchell's authority to import certain firearms into the United States. Otherwise, the court noted, "Mitchell retained complete control over the rifles. Mitchell could have done anything it wished with the rifles, except import them into the United States . . . ." *Mitchell Arms*, 7 F.3d at 217. The government did not take Mitchell's rifles, it merely took Mitchell's ability to market the rifles. The same was true of *American Pelagic*, where the plaintiff was only limited from fishing in the EEZ and could continue to fish in other parts of the Atlantic Ocean.

The present case is distinguishable from *Mitchell Arms* and *American Pelagic*. Although Huntleigh technically retains control over its business, there is nothing it can do with its business; Huntleigh cannot participate in the nation's airline screening industry. Defendant asserts that Huntleigh remains free to engage in airline screening activities that are permitted

by law. This may appear to be the case, but in reality, Huntleigh is left with minimal business opportunity. Huntleigh's primary business was to provide security screening at the nation's airports, and that activity is now completely in the hands of the federal government. Further, the interests affected-Huntleigh's contracts, goodwill, and going-concern value-were inherent to its business with the nation's airlines. The business did not *depend* on the exercise of the government's regulatory power; the federal regulations merely dictated the procedures by which Huntleigh conducted its airline passenger screenings. In *Mitchell Arms* and *American Pelagic*, because the licensees could not assign, sell or transfer their licenses, they did not have property interests in their licenses. Huntleigh, on the other hand, owns its business assets and can assign, sell or transfer these assets.

Furthermore, the present case is not a licensing case. Rather, it is very similar to *Cienega Gardens* where the mortgage prepayment right at issue was created by the real estate owners' private contracts with private lenders. 331 F.3d at 1325. Here, Huntleigh's property rights, its contracts, goodwill, and going-concern value, were created by private contracts between Huntleigh and the nation's airlines. These rights cannot be illusory just because they concern activities subject to pervasive government control. Quoting *Cienega Gardens*, "[t]hat cannot be, and is not, the law." *Id.* at 1331. Further, in *Cienega Gardens* where the government essentially rewrote the contracts between the owners and the lenders, the court found there was a taking. The present

case is even more egregious. More than rewriting the contracts between Huntleigh and the nation's airlines, the government has taken over Huntleigh's position as the contractor, and has created for itself a sweeping monopoly over the entire industry.

Finally, contrary to the government's assertion, this is not a classic *Omnia* situation. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773 (1923) (government's requisition of steel company's entire production of steel plates for one year, where plaintiff had contract with steel company to supply plaintiff with steel plate, was not a taking under the Fifth Amendment). Rather than merely bringing the contract between Huntleigh and the airlines to an end, as the government suggests, the government has appropriated Huntleigh's rights under the contract. The government has gone beyond merely taking over the subject matter of the contract, as was the case in *Omnia*. Rather, the government has kept the contract alive by stepping into Huntleigh's shoes as the contracting party.

Therefore, the Court holds that even though Huntleigh chose to do business in a highly regulated industry, it still has property interests in its assets.

III. *Takings Analysis*

The Court must now determine whether or not the government's action constitutes a compensable taking, that is, whether the government has gone "too far."

See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922). In *Penn Central Transportation v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Supreme Court identified three factors that have significance in determining whether a government regulation constitutes a taking: (1) the character of the governmental action; (2) the extent to which the regulation had interfered with distinct investment-backed expectations; and (3) the economic impact of the regulation on the claimant.

A. The Character of the Governmental Action

Defendant argues that the character of the government's action should be considered "an exercise of the police power 'directed at protecting the safety, health, and welfare of the communit[y],' " and accordingly, does not require compensation. *See Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed.Cir.2001). Defendant points to Congress' conclusion that the airlines' screeners failed to adequately protect the public, and as a consequence, public safety required government-controlled screening. Defendant maintains that the government has always had an interest in protecting the safety of airline passengers and has dictated airline screening procedures since at least 1974, with the advent of the federal nationwide anti-hijacking program. Therefore, the government argues that Huntleigh's status as a screening contractor did not flow from its own development of that market.

Plaintiff, on the other hand, characterizes the government's action as a complete monopolization of the airline security industry. In response to the government's assertion that it was entitled to use its police power to protect the public, plaintiff points out that the cases cited by the government involve claimants who themselves were found to present a danger to the public. *See Rith Energy v. United States*, 44 Fed.Cl. 108 (1999). Plaintiff alleges that unlike those plaintiffs, Huntleigh is a well-respected company that carried out its duties in compliance with the law, and in no way presented a danger to the public. Plaintiff alleges that it had been a leader in the industry for many years with a reputation for safety and excellent service. Additionally, plaintiff refutes the government's assertion that plaintiff operated its business at its peril by noting that the government has always relied heavily on private companies to provide airline passenger screening.

This Court agrees with plaintiff's characterization of the Act. In *Cienega Gardens*, the court held that the government's action constituted a compensable taking when it enacted two federal statutes that prevented owners of low-income apartments from prepaying their federally subsidized mortgages. *See Cienega Gardens*, 331 F.3d at 1338. There, the court stated that "Congress acted for a public purpose (to benefit a certain group of people in need of low-cost housing), but just as clearly, the expense was placed disproportionately on a few private property owners . . . . Congress' *purpose* in enacting the statutes may have been entirely legitimate but the government has not shown that the *actions*

Congress took-the enactment of ELIHPA and LIHPRHA-were within its powers to exercise without also granting compensation." *Id.* at 1338-1340 (emphasis in original). In the present case, as in *Cienega Gardens*, Congress acted for a public purpose in passing the Act, but the entire expense was placed on Huntleigh.

In *Rith Energy*, the court held that the revocation of the plaintiff's mining permit was an exercise of the government's police power aimed at protecting the safety, health, and welfare of the community surrounding the mine site. 270 F.3d at 1352. By contrast, Huntleigh allegedly is a company that carried out its screening duties in compliance with federal law. Therefore, at this stage of the proceeding, this Court does not consider the nature of the government's action to have been an appropriate exercise of police power. Rather, this Court holds that the nature of the government's action is the type that may require compensation, such that plaintiff should have the opportunity to present evidence.

B. Government Interference with Reasonable Investment-Backed Expectations

The second factor of the takings analysis is the extent to which defendant has interfered with plaintiff's reasonable investment-backed expectations. Defendant asserts that because Huntleigh did business in a highly regulated industry, it did not possess any investment-backed expectations. Similar to its earlier argument, the government maintains that any property right that

Huntleigh may have had was subject to a regulatory scheme intended to protect the public. The government argues that Huntleigh should have been aware that Congress would change the airline screening system if it concluded that the system was not performing effectively.

Huntleigh asserts that mere participation in a heavily regulated industry does not preclude a plaintiff from ever prevailing on a takings claim. *Conti v. United States*, 48 Fed.Cl. 532, 537 (2001). In *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1358 (Fed.Cir.2003), the court held that the plaintiff had reasonable investment-backed expectations in the continued use of its tank barges when they were rendered worthless due to government legislation that mandated single hull tank barges be retrofitted with double hulls to prevent oil spills. Plaintiff argues that it has a stronger claim than the plaintiff in *Maritrans* because although the legislation impacted Maritrans' assets, the government did not require the surrender of Maritrans' barges. Here, Huntleigh argues, the government has gone further; it has completely taken over Huntleigh's business. Huntleigh asserts that it should be entitled to the same opportunity as the plaintiff in *Maritrans* to develop the factual record and to present evidence.

Huntleigh knew it was operating in a highly regulated industry and does not challenge the government's ability to regulate procedures within the industry. What Huntleigh challenges is the destruction of its business. Huntleigh claims that it had the

expectation that it would not be eliminated from the industry by the government, and in reliance, had invested significant resources to meet its long-term contractual obligations. Huntleigh alleges that it expanded its infrastructure by hiring and training a workforce of more than 3,000 screeners. Furthermore, Huntleigh maintains that contracts with air carriers were generally for three years, and the airlines often automatically renewed for multiple consecutive terms. These are reasonable investment-backed expectations. Huntleigh should, as it asserts, have the opportunity to present evidence that the government's actions interfered with its reasonable investment-backed expectations.

C. Economic Impact of the Regulation

The third factor of the takings analysis is the economic impact of the regulation on the claimant. With regard to this factor, "[w]hat has evolved in the case law is a threshold requirement that plaintiffs show 'serious financial loss' from the regulatory imposition in order to merit compensation." *Cienega Gardens*, 331 F.3d at 1340 (citation omitted). Huntleigh asserts that is has suffered devastating losses, which for purposes of this motion the Court must accept as true. These losses include the goodwill and going-concern value associated with its business, all of its airport screening contracts, its revenue stream, tangible property, and virtually all of its well-trained workforce. The government, on the other hand, argues that it is reasonable to impose the costs inherent in a failed business on the owner of the business.

The question here is the extent of Huntleigh's losses, and whether or not the Act actually had a significant effect on its business. This factor clearly illustrates the need for a factual record. Huntleigh has alleged substantial losses and should be entitled to present evidence.

IV. *Count II-The Aviation and Transportation Security Act*

Huntleigh alleges that by failing to pay "adequate compensation" for the losses of its contracts with the airlines, the TSA has violated § 101(g) of the Aviation and Transportation Security Act. The relevant part of § 101(g) states:

> (1) SCHEDULE FOR ASSUMPTION OF CIVIL AVIATION SECURITY FUNCTIONS.–Not later than 3 months after the date of enactment of this Act, the Under Secretary of Transportation for Security shall assume civil aviation security functions and responsibilities under chapter 449 of title 49, United States Code, as amended by this Act, in accordance with a schedule to be developed by the Secretary of Transportation, in consultation with air carriers, foreign air carriers, and the Administrator of the Federal Aviation Administration.
>
> (2) ASSUMPTION OF CONTRACTS.–As of the date specified in paragraph (1), the Under

Secretary may assume the rights and responsibilities of an air carrier or foreign air carrier contract for provision of passenger screening services at airports in the United States described in section 44903(c), subject to payment of adequate compensation to parties to the contract, if any.

(3) ASSIGNMENT OF CONTRACTS.–

(A) IN GENERAL.–Upon request of the Under Secretary, an air carrier or foreign air carrier carrying out a screening or security function under chapter 449 of title 49, United States Code, may enter into an agreement with the Under Secretary to transfer any contract the carrier has entered into with respect to carrying out the function, before the Under Secretary assumes responsibility for the function.

(B) SCHEDULE.–The Under Secretary may enter into an agreement under subparagraph (A) as soon as possible, but not later than 90 days after the date of enactment of this Act. The Under Secretary may enter into such an agreement for on 180-day period and may extend such agreement for one 90-day period if the Under Secretary determines it necessary.

Huntleigh argues that although § 101(g) clearly requires the government to compensate private security companies upon assuming their airline contracts, the government failed to do so. Huntleigh argues that by taking over its airline security screening business, the government assumed its contracts with the airlines. Furthermore, Huntleigh asserts that in its March 31, 2003 report to Congress, the TSA admitted that it had assumed private screening contracts when it stated:

> As required by [the Aviation Transportation and Security Act], on February 17, 2002, TSA took over the responsibility for civil aviation security functions from [the] FAA and approximately 1400 FAA aviation security personnel became the core workforce of the TSA. That same day *TSA assumed the airlines' passenger screening company contracts* and all equipment used to perform passenger screening at the Nation's airports.
>
> Transportation Security Administration, Report to Congress on Transportation Security 10 (Mar. 31, 2003) (emphasis added).

Huntleigh contends that because § 101(g)(2) mandates compensation by the government, this Court has jurisdiction over its claim of entitlement to compensation under the Tucker Act. *See* 28 U.S.C. § 1491(a)(1); *See also United States v. Testan*, 424 U.S. 392, 398, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) (because the Tucker Act does not itself grant a substantive right to compensation, jurisdiction depends on whether a statute confers a right to recover money damages).

Appendix E

Defendant argues that the Court lacks jurisdiction over Huntleigh's claim under § 101(g). Defendant contends that because jurisdiction under the Tucker Act requires that a source of law mandate compensation by the government, Huntleigh's claim fails to establish jurisdiction. In support of this assertion, the government points to the fact that § 101(g)(2) of the Act uses the word "may" rather than "shall" when referring to compensation. The government maintains that this language suggests that compensation was merely discretionary, and accordingly, Huntleigh has failed to point to a source of law that mandates compensation.

The Court must determine whether or not Huntleigh's contracts were assumed by the government. The government argues that because it chose to execute direct interim contracts with private screeners to perform screening for the government until particular locations could be converted to government personnel, it did not assume Huntleigh's contracts. The government asserts that it chose an alternative approach to transition to government screening, an option that was permitted by the Act. The Court is not persuaded by this assertion. Even though the interim contracts allowed Huntleigh to provide screening for nine additional months, ultimately the responsibility was transferred to the government. Although the government did not initially opt to "assume" the screeners' contracts, in the end, that is what it did. The government assumed Huntleigh's contracts when, at the end of the interim period, it transferred all of Huntleigh's security responsibilities to TSA personnel.

Furthermore, this Court has jurisdiction over Huntleigh's claim. In *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 473, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003), the Court held that where the plaintiff's claim is founded upon a statute, "[i]t is enough . . . that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred,' a fair inference will do." (citation omitted). In our case, Congress contemplated compensating a private company whose contract had been assumed when, in § 101(g)(2), it used the language "subject to payment of adequate compensation to parties to the contract, if any." Huntleigh's claim under the Act is for money damages, and a fair interpretation of the Act is that the government must compensate a company when the government assumes that airport screener's contract. Further, a court can construe a federal statute as money mandating even though the statute uses the word "may" rather than "shall." *Doe v. United States,* 100 F.3d 1576, 1580-84 (Fed.Cir.1996). For all of the above reasons, the Court denies defendant's motion to dismiss Count II. The issues in Count II clearly necessitate the development of a factual record.

The Court has considered the government's other arguments and found them without merit.

Appendix E

CONCLUSION

For the foregoing reasons, the Court DENIES defendant's motion to dismiss Counts I and II.

APPENDIX F — AVIATION AND TRANSPORTATION SECURITY ACT

PUBLIC LAW 107–71—NOV. 19, 2001 115 STAT. 597

Public Law 107-71
107th Congress

An Act

To improve aviation security, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Aviation and Transportation Security Act"

TITLE I—AVIATION SECURITY

SEC. 101. TRANSPORTATION SECURITY ADMINISTRATION.

(a) IN GENERAL.—Chapter 1 of title 49, United States Code, is amended by adding at the end the following:

"§ 114. Transportation Security Administration

"(a) IN GENERAL.—The Transportation Security Administration shall be an administration of the Department of Transportation.

"(b) UNDER SECRETARY.—

"(1) APPOINTMENT.—The head of the Administration shall be the Under Secretary of Transportation for Security. The Under Secretary

shall be appointed by the President, by and with the advice and consent of the Senate.

"(2) QUALIFICATIONS.—The Under Secretary must—

"(A) be a citizen of the United States; and

"(B) have experience in a field directly related to transportation or security.

"(3) TERM.—The term of office of an individual appointed as the Under Secretary shall be 5 years.

"(c) LIMITATION ON OWNERSHIP OF STOCKS AND BONDS.—The Under Secretary may not own stock in or bonds of a transportation or security enterprise or an enterprise that makes equipment that could be used for security purposes.

"(d) FUNCTIONS.—The Under Secretary shall be responsible for security in all modes of transportation, including—

"(1) carrying out chapter 449, relating to civil aviation security, and related research and development activities; and

"(2) security responsibilities over other modes of transportation that are exercised by the Department of Transportation.

"(e) SCREENING OPERATIONS.—The Under Secretary shall—

"(1) be responsible for day-to-day Federal security screening operations for passenger air transportation and intrastate air transportation under sections 44901 and 44935;

"(2) develop standards for the hiring and retention of security screening personnel;

"(3) train and test security screening personnel; and

"(4) be responsible for hiring and training personnel to provide security screening at all airports in the United States where screening is required under section 44901, in consultation with the Secretary of Transportation and the heads of other appropriate Federal agencies and departments.

"(f) ADDITIONAL DUTIES AND POWERS.—In addition to carrying out the functions specified in subsections (d) and (e), the Under Secretary shall—

"(1) receive, assess, and distribute intelligence information related to transportation security;

"(2) assess threats to transportation;

"(3) develop policies, strategies, and plans for dealing with threats to transportation security;

"(4) make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government;

"(5) serve as the primary liaison for transportation security to the intelligence and law enforcement communities;

"(6) on a day-to-day basis, manage and provide operational guidance to the field security resources of the Administration, including Federal Security Managers as provided by section 44933;

"(7) enforce security-related regulations and requirements;

"(8) identify and undertake research and development activities necessary to enhance transportation security;

"(9) inspect, maintain, and test security facilities, equipment, and systems;

"(10) ensure the adequacy of security measures for the transportation of cargo;

"(11) oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities;

"(12) require background checks for airport security screening personnel, individuals with access to secure areas of airports, and other transportation security personnel;

"(13) work in conjunction with the Administrator of the Federal Aviation Administration with respect to any actions or activities that may affect aviation safety or air carrier operations;

"(14) work with the International Civil Aviation Organization and appropriate aeronautic authorities of foreign governments under section 44907 to address security concerns on passenger flights by foreign air carriers in foreign air transportation; and

"(15) carry out such other duties, and exercise such other powers, relating to transportation security as the Under Secretary considers appropriate, to the extent authorized by law.

"(g) NATIONAL EMERGENCY RESPONSIBILITIES.—

"(1) IN GENERAL.—Subject to the direction and control of the Secretary, the Under Secretary, during a national emergency, shall have the following responsibilities:

"(A) To coordinate domestic transportation, including aviation, rail, and other surface

transportation, and maritime transportation (including port security).

"(B) To coordinate and oversee the transportation-related responsibilities of other departments and agencies of the Federal Government other than the Department of Defense and the military departments.

"(C) To coordinate and provide notice to other departments and agencies of the Federal Government, and appropriate agencies of State and local governments, including departments and agencies for transportation, law enforcement, and border control, about threats to transportation.

"(D) To carry out such other duties, and exercise such other powers, relating to transportation during a national emergency as the Secretary shall prescribe.

"(2) AUTHORITY OF OTHER DEPARTMENTS AND AGENCIES.—The authority of the Under Secretary under this subsection shall not supersede the authority of any other department or agency of the Federal Government under law with respect to transportation or transportation-related matters, whether or not during a national emergency.

"(3) CIRCUMSTANCES.—The Secretary shall prescribe the circumstances constituting a national emergency for purposes of this subsection.

"(h) MANAGEMENT OF SECURITY INFORMATION.—In consultation with the Transportation Security Oversight Board, the Under Secretary shall—

"(1) enter into memoranda of understanding with Federal agencies or other entities to share or otherwise cross-check as necessary data on individuals identified on Federal agency databases who may pose a risk to transportation or national security;

"(2) establish procedures for notifying the Administrator of the Federal Aviation Administration, appropriate State and local law enforcement officials, and airport or airline security officers of the identity of individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety;

"(3) in consultation with other appropriate Federal agencies and air carriers, establish policies and procedures requiring air carriers—

"(A) to use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security; and

"(B) if such an individual is identified, notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual; and

"(4) consider requiring passenger air carriers to share passenger lists with appropriate Federal agencies for the purpose of identifying individuals who may pose a threat to aviation safety or national security.

"(i) VIEW OF NTSB.—In taking any action under this section that could affect safety, the Under Secretary shall give great weight to the timely views of the National Transportation Safety Board.

"(j) ACQUISITIONS.—

"(1) IN GENERAL.—The Under Secretary is authorized—

"(A) to acquire (by purchase, lease, condemnation, or otherwise) such real property, or any interest therein, within and outside the continental United States, as the Under Secretary considers necessary;

"(B) to acquire (by purchase, lease, condemnation, or otherwise) and to construct, repair, operate, and maintain such personal property (including office space and patents), or any interest therein, within and outside the continental United States, as the Under Secretary considers necessary;

"(C) to lease to others such real and personal property and to provide by contract

or otherwise for necessary facilities for the welfare of its employees and to acquire, maintain, and operate equipment for these facilities;

"(D) to acquire services, including such personal services as the Secretary determines necessary, and to acquire (by purchase, lease, condemnation, or otherwise) and to construct, repair, operate, and maintain research and testing sites and facilities; and

"(E) in cooperation with the Administrator of the Federal Aviation Administration, to utilize the research and development facilities of the Federal Aviation Administration.

"(2) TITLE.—Title to any property or interest therein acquired pursuant to this subsection shall be held by the Government of the United States.

"(k) TRANSFERS OF FUNDS.—The Under Secretary is authorized to accept transfers of unobligated balances and unexpended balances of funds appropriated to other Federal agencies (as such term is defined in section 551(1) of title 5) to carry out functions transferred, on or after the date of enactment of the Aviation and Transportation Security Act, by law to the Under Secretary.

Appendix F

"(l) REGULATIONS.—

"(1) IN GENERAL.—The Under Secretary is authorized to issue, rescind, and revise such regulations as are necessary to carry out the functions of the Administration.

"(2) EMERGENCY PROCEDURES.—

"(A) IN GENERAL.—Notwithstanding any other provision of law or executive order (including an executive order requiring a cost-benefit analysis), if the Under Secretary determines that a regulation or security directive must be issued immediately in order to protect transportation security, the Under Secretary shall issue the regulation or security directive without providing notice or an opportunity for comment and without prior approval of the Secretary.

"(B) REVIEW BY TRANSPORTATION SECURITY OVERSIGHT BOARD.—Any regulation or security directive issued under this paragraph shall be subject to review by the Transportation Security Oversight Board established under section 115. Any regulation or security directive issued under this paragraph shall remain effective unless disapproved by the Board or rescinded by the Under Secretary.

"(3) FACTORS TO CONSIDER.—In determining whether to issue, rescind, or revise a regulation under this section, the Under Secretary shall consider, as a factor in the final determination, whether the costs of the regulation are excessive in relation to the enhancement of security the regulation will provide. The Under Secretary may waive requirements for an analysis that estimates the number of lives that will be saved by the regulation and the monetary value of such lives if the Under Secretary determines that it is not feasible to make such an estimate.

"(4) AIRWORTHINESS OBJECTIONS BY FAA.—

"(A) IN GENERAL.—The Under Secretary shall not take an aviation security action under this title if the Administrator of the Federal Aviation Administration notifies the Under Secretary that the action could adversely affect the airworthiness of an aircraft.

"(B) REVIEW BY SECRETARY.—Notwithstanding subparagraph (A), the Under Secretary may take such an action, after receiving a notification concerning the action from the Administrator under subparagraph (A), if the Secretary of Transportation subsequently approves the action.

"(m) PERSONNEL AND SERVICES; COOPERATION BY UNDER SECRETARY.—

"(1) AUTHORITY OF UNDER SECRETARY.—In carrying out the functions of the Administration, the Under Secretary shall have the same authority as is provided to the Administrator of the Federal Aviation Administration under subsections (l) and (m) of section 106.

"(2) AUTHORITY OF AGENCY HEADS.—The head of a Federal agency shall have the same authority to provide services, supplies, equipment, personnel, and facilities to the Under Secretary as the head has to provide services, supplies, equipment, personnel, and facilities to the Administrator of the Federal Aviation Administration under section 106(m).

"(n) PERSONNEL MANAGEMENT SYSTEM.—The personnel management system established by the Administrator of the Federal Aviation Administration under section 40122 shall apply to employees of the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary may make such modifications to the personnel management system with respect to such employees as the Under Secretary considers appropriate, such as adopting aspects of other personnel systems of the Department of Transportation.

"(o) ACQUISITION MANAGEMENT SYSTEM.—The acquisition management system established by the Administrator of the Federal Aviation Administration under section 40110 shall apply to acquisitions of equipment, supplies, and materials by the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary may make such modifications to the acquisition management system with respect to such acquisitions of equipment, supplies, and materials as the Under Secretary considers appropriate, such as adopting aspects of other acquisition management systems of the Department of Transportation.

"(p) AUTHORITY OF INSPECTOR GENERAL.—The Transportation Security Administration shall be subject to the Inspector General Act of 1978 (5 U.S.C. App.) and other laws relating to the authority of the Inspector General of the Department of Transportation.

"(q) LAW ENFORCEMENT POWERS.—

"(1) IN GENERAL.—The Under Secretary may designate an employee of the Transportation Security Administration to serve as a law enforcement officer.

"(2) POWERS.—While engaged in official duties of the Administration as required to fulfill the responsibilities under this section, a law enforcement officer designated under paragraph (1) may—

"(A) carry a firearm;

"(B) make an arrest without a warrant for any offense against the United States committed in the presence of the officer, or for any felony cognizable under the laws of the United States if the officer has probable cause to believe that the person to be arrested has committed or is committing the felony; and

"(C) seek and execute warrants for arrest or seizure of evidence issued under the authority of the United States upon probable cause that a violation has been committed.

"(3) GUIDELINES ON EXERCISE OF AUTHORITY.—The authority provided by this subsection shall be exercised in accordance with guidelines prescribed by the Under Secretary, in consultation with the Attorney General of the United States, and shall include adherence to the Attorney General's policy on use of deadly force.

"(4) REVOCATION OR SUSPENSION OF AUTHORITY.—The powers authorized by this subsection may be rescinded or suspended should the Attorney General determine that the Under Secretary has not complied with the guidelines prescribed in paragraph (3) and conveys the determination in writing to the Secretary of Transportation and the Under Secretary.

"(r) AUTHORITY TO EXEMPT.—The Under Secretary may grant an exemption from a regulation prescribed in carrying out this section if the Under Secretary determines that the exemption is in the public interest.".

<< 49 USCA prec. § 101 >>

(b) CONFORMING AMENDMENT.—The analysis for chapter 1 of such title is amended by adding at the end the following:

"114. Transportation Security Administration.".

(c) POSITION OF UNDER SECRETARY IN EXECUTIVE SCHEDULE.—

<< 5 USCA § 5313 >>

(1) IN GENERAL.—Section 5313 of title 5, United States Code, is amended by adding at the end the following:

"The Under Secretary of Transportation for Security.".

<< 5 USCA § 5313 NOTE >>

(2) BONUS ELIGIBILITY.—In addition to the annual rate of pay authorized by section 5313 of title 5, United States Code, the Under Secretary may receive a bonus for any calendar year not to

exceed 30 percent of the annual rate of pay, based on the Secretary's evaluation of the Under Secretary's performance.

<< 49 USCA § 106 >>

(3) CONFORMING CHANGE.—Section 106(r)(2)(A) of title 49, United States Code, is amended to read as follows:

> "(A) IN GENERAL.—The Chief Operating Officer shall be paid at an annual rate of basic pay to be determined by the Administrator, with the approval of the Air Traffic Services Subcommittee of the Aviation Management Advisory Council. The annual rate may not exceed the annual compensation paid under section 102 of title 3. The Chief Operating Officer shall be subject to the post-employment provisions of section 207 of title 18 as if the position of Chief Operating Officer were described in section 207(c)(2)(A)(i) of that title.".

<< 49 USCA § 106 >>

(d) COOPERATION WITH OTHER AGENCIES.—The last sentence of section 106(m) of such title is amended by striking "supplies and" and inserting "supplies, personnel, services, and".

(e) SECURITY AND RESEARCH AND DEVELOPMENT ACTIVITIES.—Section 40119 of such title is amended—

Appendix F

<< 49 USCA § 40119 >>

(1) in subsection (a) by striking "Administrator of the Federal Aviation Administration" and inserting "Under Secretary of Transportation for Security";

<< 49 USCA § 40119 >>

(2) in subsections (b) and (c) by striking "Administrator" each place it appears and inserting "Under Secretary"; and

<< 49 USCA § 40119 >>

(3) in subsection (b)(1)(C) by striking "air".

(f) REFERENCES TO FAA IN CHAPTER 449.—Chapter 449 of such title is amended—

<< 49 USCA § 44904 >>

(1) in section 44904(b)(5) by striking "the Administration" and inserting "the Transportation Security Administration";

<< 49 USCA § 44913 >>

(2) in the second sentence of section 44913(a)(1) by striking "of the Administration" and inserting "of the Transportation Security Administration";

Appendix F

<< 49 USCA § 44916 >>

(3) in section 44916(a)—

(A) in the first sentence by striking "Administrator" and inserting "Under Secretary of Transportation for Security"; and

(B) in the second sentence by striking "Administration" and inserting "Transportation Security Administration";

<< 49 USCA § 44933 >>
<< 49 USCA § 44934 >>

(4) in each of sections 44933(a) and 44934(b) by striking "Assistant Administrator for Civil Aviation Security" and inserting "Under Secretary";

<< 49 USCA § 44934 >>

(5) in section 44934(b)(1) by striking "Assistant Administrator" and inserting "Under Secretary";

<< 49 USCA prec. § 44901 >>
<< 49 USCA § 44931 >>
<< 49 USCA § 44932 >>

(6) by striking sections 44931 and 44932 and the items relating to such sections in the analysis for such chapter;

Appendix F

<< 49 USCA § 44901 >>
<< 49 USCA § 44902 >>
<< 49 USCA § 44903 >>
<< 49 USCA § 44904 >>
<< 49 USCA § 44905 >>
<< 49 USCA § 44906 >>
<< 49 USCA § 44911 >>
<< 49 USCA § 44912 >>
<< 49 USCA § 44913 >>
<< 49 USCA § 44914 >>
<< 49 USCA § 44915 >>
<< 49 USCA § 44916 >>
<< 49 USCA § 44934 >>
<< 49 USCA § 44935 >>
<< 49 USCA § 44936 >>
<< 49 USCA § 44937 >>
<< 49 USCA § 44938 >>

(7) by striking "Administrator" each place it appears in such chapter (except in subsections (f) and (h) of section 44936) and inserting "Under Secretary";

<< 49 USCA § 44903 >>

(8) by striking "Administrator's" each place it appears in such chapter and inserting "Under Secretary's"; and

Appendix F

<< 49 USCA § 44902 >>
<< 49 USCA § 44903 >>
<< 49 USCA § 44904 >>
<< 49 USCA § 44905 >>
<< 49 USCA § 44906 >>
<< 49 USCA § 44911 >>
<< 49 USCA § 44912 >>
<< 49 USCA § 44913 >>
<< 49 USCA § 44914 >>
<< 49 USCA § 44915 >>
<< 49 USCA § 44934 >>
<< 49 USCA § 44935 >>
<< 49 USCA § 44936 >>
<< 49 USCA § 44937 >>
<< 49 USCA § 44938 >>

(9) by striking "of the Federal Aviation Administration" each place it appears in such chapter (except in section 44936(f)) and inserting "of Transportation for Security".

<< 49 USCA § 44901 NOTE >>

(g) TRANSITION PROVISIONS.—

(1) SCHEDULE FOR ASSUMPTION OF CIVIL AVIATION SECURITY FUNCTIONS.—Not later than 3 months after the date of enactment of this Act, the Under Secretary of Transportation for Security shall assume civil aviation security functions and responsibilities under chapter 449 of title 49, United States Code, as amended by this Act, in

accordance with a schedule to be developed by the Secretary of Transportation, in consultation with air carriers, foreign air carriers, and the Administrator of the Federal Aviation Administration. The Under Secretary shall publish an appropriate notice of the transfer of such security functions and responsibilities before assuming the functions and responsibilities.

(2) ASSUMPTION OF CONTRACTS.—As of the date specified in paragraph (1), the Under Secretary may assume the rights and responsibilities of an air carrier or foreign air carrier contract for provision of passenger screening services at airports in the United States described in section 44903(c), subject to payment of adequate compensation to parties to the contract, if any.

(3) ASSIGNMENT OF CONTRACTS.—

(A) IN GENERAL.—Upon request of the Under Secretary, an air carrier or foreign air carrier carrying out a screening or security function under chapter 449 of title 49, United States Code, may enter into an agreement with the Under Secretary to transfer any contract the carrier has entered into with respect to carrying out the function, before the Under Secretary assumes responsibility for the function.

(B) SCHEDULE.—The Under Secretary may enter into an agreement under subparagraph (A) as soon as possible, but not later than 90 days after the date of enactment of this Act. The Under Secretary may enter into such an agreement for one 180-day period and may extend such agreement for one 90-day period if the Under Secretary determines it necessary.

(4) TRANSFER OF OWNERSHIP.—In recognition of the assumption of the financial costs of security screening of passengers and property at airports, and as soon as practical after the date of enactment of this Act, air carriers may enter into agreements with the Under Secretary to transfer the ownership, at no cost to the United States Government, of any personal property, equipment, supplies, or other material associated with such screening, regardless of the source of funds used to acquire the property, that the Secretary determines to be useful for the performance of security screening of passengers and property at airports.

(5) PERFORMANCE OF UNDER SECRETARY'S FUNCTIONS DURING INTERIM PERIOD.—Until the Under Secretary takes office, the functions of the Under Secretary that relate to aviation security may be carried out by the Secretary or the Secretary's designee.

Appendix F

* * *

SEC. 109. ENHANCED SECURITY MEASURES.

(a) IN GENERAL.—The Under Secretary of Transportation for Security may take the following actions:

(1) Require effective 911 emergency call capability for telephones serving passenger aircraft and passenger trains.

(2) Establish a uniform system of identification for all State and local law enforcement personnel for use in obtaining permission to carry weapons in aircraft cabins and in obtaining access to a secured area of an airport, if otherwise authorized to carry such weapons.

(3) Establish requirements to implement trusted passenger programs and use available technologies to expedite the security screening of passengers who participate in such programs, thereby allowing security screening personnel to focus on those passengers who should be subject to more extensive screening.

(4) In consultation with the Commissioner of the Food and Drug Administration, develop alternative security procedures under which a medical product to be transported on a flight of an air carrier would not be subject to an inspection that would irreversibly damage the product.

(5) Provide for the use of technologies, including wireless and wire line data technologies, to enable the private and secure communication of threats to aid in the screening of passengers and other individuals on airport property who are identified on any State or Federal security-related data base for the purpose of having an integrated response coordination of various authorized airport security forces.

(6) In consultation with the Administrator of the Federal Aviation Administration, consider whether to require all pilot licenses to incorporate a photograph of the license holder and appropriate biometric imprints.

(7) Provide for the use of voice stress analysis, biometric, or other technologies to prevent a person who might pose a danger to air safety or security from boarding the aircraft of an air carrier or foreign air carrier in air transportation or intrastate air transportation.

(8) Provide for the use of technology that will permit enhanced instant communications and information between airborne passenger aircraft and appropriate individuals or facilities on the ground.

(b) REPORT.—Not later than 6 months after the date of enactment of this Act, and annually thereafter until the Under Secretary has implemented or decided not to take each of the actions specified in subsection (a), the Under Secretary shall transmit to Congress a report on the progress of the Under Secretary in evaluating and taking such actions, including any legislative recommendations that the Under Secretary may have for enhancing transportation security.

SEC. 110. SCREENING.

(a) REVIEW AND DEVELOPMENT OF WAYS TO STRENGTHEN SECURITY.—Section 44932(c) of title 49, United States Code, is amended—

<< 49 USCA § 44932 >>

(1) by striking "x-ray" in paragraph (4);

<< 49 USCA § 44932 >>

(2) by striking "and" at the end of paragraph (4);

<< 49 USCA § 44932 >>

(3) by striking "passengers." in paragraph (5) and inserting "passengers;"; and

Appendix F

<< 49 USCA § 44932 >>

(4) by adding at the end the following:

"(6) to strengthen and enhance the ability to detect or neutralize nonexplosive weapons, such as biological, chemical, or similar substances; and

"(7) to evaluate such additional measures as may be appropriate to enhance inspection of passengers, baggage, and cargo.".

(b) PASSENGERS AND PROPERTY.—Section 44901 of title 49, United States Code, is amended—

<< 49 USCA § 44901 >>

(1) by redesignating subsection (c) as subsection (h); and

<< 49 USCA § 44901 >>

(2) by striking subsections (a) and (b) and inserting the following:

"(a) IN GENERAL.—The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air

transportation. In the case of flights and flight segments originating in the United States, the screening shall take place before boarding and shall be carried out by a Federal Government employee (as defined in section 2105 of title 5, United States Code), except as otherwise provided in section 44919 or 44920 and except for identifying passengers and baggage for screening under the CAPPS and known shipper programs and conducting positive bag-match programs.

"(b) SUPERVISION OF SCREENING.—All screening of passengers and property at airports in the United States where screening is required under this section shall be supervised by uniformed Federal personnel of the Transportation Security Administration who shall have the power to order the dismissal of any individual performing such screening.

"(c) CHECKED BAGGAGE.—A system must be in operation to screen all checked baggage at all airports in the United States as soon as practicable but not later than the 60th day following the date of enactment of the Aviation and Transportation Security Act.

"(d) EXPLOSIVE DETECTION SYSTEMS.—

"(1) IN GENERAL.—The Under Secretary of Transportation for Security shall take all necessary action to ensure that—

"(A) explosive detection systems are deployed as soon as possible to ensure that all

Appendix F

United States airports described in section 44903(c) have sufficient explosive detection systems to screen all checked baggage no later than December 31, 2002, and that as soon as such systems are in place at an airport, all checked baggage at the airport is screened by those systems; and

"(B) all systems deployed under subparagraph (A) are fully utilized; and

"(C) if explosive detection equipment at an airport is unavailable, all checked baggage is screened by an alternative means.

"(e) MANDATORY SCREENING WHERE EDS NOT YET AVAILABLE.—As soon as practicable but not later than the 60th day following the date of enactment of the Aviation and Transportation Security Act and until the requirements of subsection (b)(1)(A) are met, the Under Secretary shall require alternative means for screening any piece of checked baggage that is not screened by an explosive detection system. Such alternative means may include 1 or more of the following:

"(1) A bag-match program that ensures that no checked baggage is placed aboard an aircraft unless the passenger who checked the baggage is aboard the aircraft.

"(2) Manual search.

"(3) Search by canine explosive detection units in combination with other means.

"(4) Other means or technology approved by the Under Secretary.

"(f) CARGO DEADLINE.—A system must be in operation to screen, inspect, or otherwise ensure the security of all cargo that is to be transported in all-cargo aircraft in air transportation and intrastate air transportation as soon as practicable after the date of enactment of the Aviation and Transportation Security Act.

"(g) DEPLOYMENT OF ARMED PERSONNEL.—

"(1) IN GENERAL.—The Under Secretary shall order the deployment of law enforcement personnel authorized to carry firearms at each airport security screening location to ensure passenger safety and national security.

"(2) MINIMUM REQUIREMENTS.—Except at airports required to enter into agreements under subsection (c), the Under Secretary shall order the deployment of at least 1 law enforcement officer at each airport security screening location. At the 100 largest airports in the United States, in terms of annual passenger enplanements for the most recent calendar year for which data are available, the Under Secretary shall order the deployment of additional law enforcement personnel at airport

security screening locations if the Under Secretary determines that the additional deployment is necessary to ensure passenger safety and national security.".

<< 49 USCA § 44901 NOTE >>

(c) DEADLINE FOR DEPLOYMENT OF FEDERAL SCREENERS.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Under Secretary of Transportation for Security shall deploy at all airports in the United States where screening is required under section 44901 of title 49, United States Code, a sufficient number of Federal screeners, Federal Security Managers, Federal security personnel, and Federal law enforcement officers to conduct the screening of all passengers and property under section 44901 of such title at such airports.

(2) CERTIFICATION TO CONGRESS.—Not later than 1 year after the date of enactment of this Act, the Under Secretary shall transmit to Congress a certification that the requirement of paragraph (1) has been met.

Appendix F

<< 49 USCA § 44901 NOTE >>

(d) REPORTS.—

(1) DEPLOYMENT.—Within 6 months after the date of enactment of this Act, the Under Secretary of Transportation for Security shall report to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Transportation and Infrastructure of the House of Representatives on the deployment of the systems required by section 44901(c) of title 49, United States Code. The Under Secretary shall include in the report—

(A) an installation schedule;

(B) the dates of installation of each system; and

(C) the date on which each system installed is operational.

(2) SCREENING OF SMALL AIRCRAFT.—Within 1 year after the date of enactment of this Act, the Under Secretary of Transportation for Security shall transmit a report to the Committee on Commerce, Science, and Transportation of the Senate and Committee on Transportation and Infrastructure of the House of Representatives on the screening requirements applicable to passengers boarding, and property being

carried aboard, aircraft with 60 seats or less used in scheduled passenger service with recommendations for any necessary changes in those requirements.

SEC. 111. TRAINING AND EMPLOYMENT OF SECURITY SCREENING PERSONNEL.

(a) IN GENERAL.—Section 44935 of title 49, United States Code, is amended—

<< 49 USCA § 44935 >>

(1) by redesignating subsection (f) as subsection (i); and

<< 49 USCA § 44935 >>

(2) by striking subsection (e) and inserting the following:

"(e) SECURITY SCREENERS.—

"(1) TRAINING PROGRAM.—The Under Secretary of Transportation for Security shall establish a program for the hiring and training of security screening personnel.

"(2) HIRING.—

"(A) QUALIFICATIONS.—Within 30 days after the date of enactment of the Aviation and

Appendix F

Transportation Security Act, the Under Secretary shall establish qualification standards for individuals to be hired by the United States as security screening personnel. Notwithstanding any provision of law, those standards shall require, at a minimum, an individual—

"(i) to have a satisfactory or better score on a Federal security screening personnel selection examination;

"(ii) to be a citizen of the United States;

"(iii) to meet, at a minimum, the requirements set forth in subsection (f);

"(iv) to meet such other qualifications as the Under Secretary may establish; and

"(v) o have the ability to demonstrate daily a fitness for duty without any impairment due to illegal drugs, sleep deprivation, medication, or alcohol.

"(B) BACKGROUND CHECKS.—The Under Secretary shall require that an individual to be hired as a security screener undergo an employment investigation (including a criminal history record check) under section 44936(a)(1).

"(C) DISQUALIFICATION OF INDIVIDUALS WHO PRESENT NATIONAL SECURITY RISKS.— The Under Secretary, in consultation with the heads of other appropriate Federal agencies, shall establish procedures, in addition to any background check conducted under section 44936, to ensure that no individual who presents a threat to national security is employed as a security screener.

"(3) EXAMINATION; REVIEW OF EXISTING RULES.—The Under Secretary shall develop a security screening personnel examination for use in determining the qualification of individuals seeking employment as security screening personnel. The Under Secretary shall also review, and revise as necessary, any standard, rule, or regulation governing the employment of individuals as security screening personnel.

"(f) EMPLOYMENT STANDARDS FOR SCREENING PERSONNEL.—

"(1) SCREENER REQUIREMENTS.—Notwithstanding any provision of law, an individual may not be deployed as a security screener unless that individual meets the following requirements:

"(A) The individual shall possess a high school diploma, a general equivalency diploma, or experience that the Under Secretary has determined to be sufficient for the individual to perform the duties of the position.

"(B) The individual shall possess basic aptitudes and physical abilities, including color perception, visual and aural acuity, physical coordination, and motor skills, to the following standards:

"(i) Screeners operating screening equipment shall be able to distinguish on the screening equipment monitor the appropriate imaging standard specified by the Under Secretary.

"(ii) Screeners operating any screening equipment shall be able to distinguish each color displayed on every type of screening equipment and explain what each color signifies.

"(iii) Screeners shall be able to hear and respond to the spoken voice and to audible alarms generated by screening equipment in an active checkpoint environment.

"(iv) Screeners performing physical searches or other related operations shall be able to efficiently and thoroughly manipulate and handle such baggage, containers, and other objects subject to security processing.

"(v) Screeners who perform pat-downs or hand-held metal detector searches of individuals shall have sufficient dexterity and capability to thoroughly conduct those procedures over an individual's entire body.

"(C) The individual shall be able to read, speak, and write English well enough to—

"(i) carry out written and oral instructions regarding the proper performance of screening duties;

"(ii) read English language identification media, credentials, airline tickets, and labels on items normally encountered in the screening process;

"(iii) provide direction to and understand and answer questions from English-speaking individuals undergoing screening; and

"(iv) write incident reports and statements and log entries into security records in the English language.

"(D) The individual shall have satisfactorily completed all initial, recurrent, and appropriate specialized training required by the security program, except as provided in paragraph (3).

"(2) VETERANS PREFERENCE.—The Under Secretary shall provide a preference for the hiring of an individual as a security screener if the individual is a member or former member of the armed forces and if the individual is entitled, under statute, to retired, retirement, or retainer pay on account of service as a member of the armed forces.

"(3) EXCEPTIONS.—An individual who has not completed the training required by this section may be deployed during the on-the-job portion of training to perform functions if that individual—

"(A) is closely supervised; and

"(B) does not make independent judgments as to whether individuals or property may enter a sterile area or aircraft without further inspection.

"(4) REMEDIAL TRAINING.—No individual employed as a security screener may perform a screening function after that individual has failed an operational test related to that function until that individual has successfully completed the remedial training specified in the security program.

"(5) ANNUAL PROFICIENCY REVIEW.—The Under Secretary shall provide that an annual evaluation of each individual assigned screening duties is conducted and documented. An individual employed as a security screener may not continue

to be employed in that capacity unless the evaluation demonstrates that the individual—

"(A) continues to meet all qualifications and standards required to perform a screening function;

"(B) has a satisfactory record of performance and attention to duty based on the standards and requirements in the security program; and

"(C) demonstrates the current knowledge and skills necessary to courteously, vigilantly, and effectively perform screening functions.

"(6) OPERATIONAL TESTING.—In addition to the annual proficiency review conducted under paragraph (5), the Under Secretary shall provide for the operational testing of such personnel.

"(g) TRAINING.—

"(1) USE OF OTHER AGENCIES.—The Under Secretary may enter into a memorandum of understanding or other arrangement with any other Federal agency or department with appropriate law enforcement responsibilities, to provide personnel, resources, or other forms of assistance in the training of security screening personnel.

"(2) TRAINING PLAN.—Within 60 days after the date of enactment of the Aviation and Transportation Security Act, the Under Secretary shall develop a plan for the training of security screening personnel. The plan shall require, at a minimum, that a security screener—

"(A) has completed 40 hours of classroom instruction or successfully completed a program that the Under Secretary determines will train individuals to a level of proficiency equivalent to the level that would be achieved by such classroom instruction;

"(B) has completed 60 hours of on-the-job instructions; and

"(C) has successfully completed an on-the-job training examination prescribed by the Under Secretary.

"(3) EQUIPMENT-SPECIFIC TRAINING.—An individual employed as a security screener may not use any security screening device or equipment in the scope of that individual's employment unless the individual has been trained on that device or equipment and has successfully completed a test on the use of the device or equipment.

"(h) TECHNOLOGICAL TRAINING.—

"(1) IN GENERAL.—The Under Secretary shall require training to ensure that screeners are proficient in using the most up-to-date new technology and to ensure their proficiency in recognizing new threats and weapons.

"(2) PERIODIC ASSESSMENTS.—The Under Secretary shall make periodic assessments to determine if there are dual use items and inform security screening personnel of the existence of such items.

"(3) CURRENT LISTS OF DUAL USE ITEMS.—Current lists of dual use items shall be part of the ongoing training for screeners.

"(4) DUAL USE DEFINED.—For purposes of this subsection, the term 'dual use' item means an item that may seem harmless but that may be used as a weapon.

"(i) LIMITATION ON RIGHT TO STRIKE.—An individual that screens passengers or property, or both, at an airport under this section may not participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening.

"(j) UNIFORMS.—The Under Secretary shall require any individual who screens passengers and property pursuant to section 44901 to be attired while on duty in a uniform approved by the Under Secretary.".

(b) CONFORMING AMENDMENTS.—Section 44936(a)(1) of title 49, United States Code, is amended—

<< 49 USCA § 44936 >>

(1) in subparagraph (A) by inserting "as a security screener under section 44935(e) or a position" after "a position"; and

<< 49 USCA § 44936 >>

(2) in subparagraph (E) by striking clause (iv).

<< 49 USCA § 44935 NOTE >>

(c) TRANSITION.—The Under Secretary of Transportation for Security shall complete the full implementation of section 44935 (e), (f), (g), and (h) of title 49, United States Code, as amended by subsection (a), as soon as is practicable. The Under Secretary may make or continue such arrangements for the training of security screeners under that section as the Under Secretary determines necessary pending full implementation of that section as so amended.

Appendix F

<< 49 USCA § 44935 NOTE >>

(d) SCREENER PERSONNEL.—Notwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary under section 44901 of title 49, United States Code. The Under Secretary shall establish levels of compensation and other benefits for individuals so employed.

<< 49 USCA § 44912 >>

* * *

SEC. 118. SECURITY SERVICE FEE.

<< 49 USCA § 44940 >>

(a) IN GENERAL.—Subchapter II of chapter 449 is amended by adding at the end the following:

"§ 44940. Security service fee

"(a) GENERAL AUTHORITY.—

"(1) PASSENGER FEES.—The Under Secretary of Transportation for Security shall impose a uniform fee, on passengers of air carriers and

foreign air carriers in air transportation and intrastate air transportation originating at airports in the United States, to pay for the following costs of providing civil aviation security services:

"(A) Salary, benefits, overtime, retirement and other costs of screening personnel, their supervisors and managers, and Federal law enforcement personnel deployed at airport security screening locations under section 44901.

"(B) The costs of training personnel described in subparagraph (A), and the acquisition, operation, and maintenance of equipment used by such personnel.

"(C) The costs of performing background investigations of personnel described in subparagraphs (A), (D), (F), and (G).

"(D) The costs of the Federal air marshals program.

"(E) The costs of performing civil aviation security research and development under this title.

"(F) The costs of Federal Security Managers under section 44903.

"(G) The costs of deploying Federal law enforcement personnel pursuant to section 44903(h).

The amount of such costs shall be determined by the Under Secretary and shall not be subject to judicial review.

"(2) AIR CARRIER FEES.—

"(A) AUTHORITY.—In addition to the fee imposed pursuant to paragraph (1), and only to the extent that the Under Secretary estimates that such fee will be insufficient to pay for the costs of providing civil aviation security services described in paragraph (1), the Under Secretary may impose a fee on air carriers and foreign air carriers engaged in air transportation and intrastate air transportation to pay for the difference between any such costs and the amount collected from such fee, as estimated by the Under Secretary at the beginning of each fiscal year. The estimates of the Under Secretary under this subparagraph are not subject to judicial review.

"(B) LIMITATIONS.—

"(i) OVERALL LIMIT.—The amounts of fees collected under this paragraph for each fiscal year may not exceed, in the aggregate, the amounts paid in calendar year 2000 by carriers described in subparagraph (A) for screening

passengers and property, as determined by the Under Secretary.

"(ii) PER-CARRIER LIMIT.—The amount of fees collected under this paragraph from an air carrier described in subparagraph (A) for each of fiscal years 2002, 2003, and 2004 may not exceed the amount paid in calendar year 2000 by that carrier for screening passengers and property, as determined by the Under Secretary.

"(iii) ADJUSTMENT OF PER-CARRIER LIMIT.—For fiscal year 2005 and subsequent fiscal years, the per-carrier limitation under clause (ii) may be determined by the Under Secretary on the basis of market share or any other appropriate measure in lieu of actual screening costs in calendar year 2000.

"(iv) FINALITY OF DETERMINATIONS.—Determinations of the Under Secretary under this subparagraph are not subject to judicial review.

"(C) SPECIAL RULE FOR FISCAL YEAR 2002.—The amount of fees collected under this paragraph from any carrier for fiscal year 2002 may not exceed the amounts paid by that carrier for screening passengers and property for a period of time in calendar year 2000 proportionate to the period of time in fiscal year 2002 during which fees are collected under this paragraph.

"(b) SCHEDULE OF FEES.—In imposing fees under subsection (a), the Under Secretary shall ensure that the fees are reasonably related to the Transportation Security Administration's costs of providing services rendered.

"(c) LIMITATION ON FEE.—Fees imposed under subsection (a)(1) may not exceed $2.50 per enplanement in air transportation or intrastate air transportation that originates at an airport in the United States, except that the total amount of such fees may not exceed $5.00 per one-way trip.

"(d) IMPOSITION OF FEE.—

"(1) IN GENERAL.—Notwithstanding section 9701 of title 31 and the procedural requirements of section 553 of title 5, the Under Secretary shall impose the fee under subsection (a)(1), and may impose a fee under subsection (a)(2), through the publication of notice of such fee in the Federal Register and begin collection of the fee within 60 days of the date of enactment of this Act, or as soon as possible thereafter.

"(2) SPECIAL RULES PASSENGER FEES.—A fee imposed under subsection (a)(1) through the procedures under subsection (d) shall apply only to tickets sold after the date on which such fee is imposed. If a fee imposed under subsection (a)(1) through the procedures under subsection (d) on transportation of a passenger of a carrier

described in subsection (a)(1) is not collected from the passenger, the amount of the fee shall be paid by the carrier.

"(3) SUBSEQUENT MODIFICATION OF FEE.—After imposing a fee in accordance with paragraph (1), the Under Secretary may modify, from time to time through publication of notice in the Federal Register, the imposition or collection of such fee, or both.

"(4) LIMITATION ON COLLECTION.—No fee may be collected under this section except to the extent that the expenditure of the fee to pay the costs of activities and services for which the fee is imposed is provided for in advance in an appropriations Act.

"(e) ADMINISTRATION OF FEES.—

"(1) FEES PAYABLE TO UNDER SECRETARY.—All fees imposed and amounts collected under this section are payable to the Under Secretary.

"(2) FEES COLLECTED BY AIR CARRIER.—A fee imposed under subsection (a)(1) shall be collected by the air carrier or foreign air carrier that sells a ticket for transportation described in subsection (a)(1).

"(3) DUE DATE FOR REMITTANCE.—A fee collected under this section shall be remitted on the last day of each calendar month by the carrier

collecting the fee. The amount to be remitted shall be for the calendar month preceding the calendar month in which the remittance is made.

"(4) INFORMATION.—The Under Secretary may require the provision of such information as the Under Secretary decides is necessary to verify that fees have been collected and remitted at the proper times and in the proper amounts.

"(5) FEE NOT SUBJECT TO TAX.—For purposes of section 4261 of the Internal Revenue Code of 1986 (26 U.S.C. 4261), a fee imposed under this section shall not be considered to be part of the amount paid for taxable transportation.

"(6) COST OF COLLECTING FEE.—No portion of the fee collected under this section may be retained by the air carrier or foreign air carrier for the costs of collecting, handling, or remitting the fee except for interest accruing to the carrier after collection and before remittance.

"(f) RECEIPTS CREDITED AS OFFSETTING COLLECTIONS.—Notwithstanding section 3302 of title 31, any fee collected under this section—

"(1) shall be credited as offsetting collections to the account that finances the activities and services for which the fee is imposed;

"(2) shall be available for expenditure only to pay the costs of activities and services for which the fee is imposed; and

"(3) shall remain available until expended.

"(g) REFUNDS.—The Under Secretary may refund any fee paid by mistake or any amount paid in excess of that required.

"(h) EXEMPTIONS.—The Under Secretary may exempt from the passenger fee imposed under subsection (a)(1) any passenger enplaning at an airport in the United States that does not receive screening services under section 44901 for that segment of the trip for which the passenger does not receive screening.".

<< 49 USCA prec. § 44901 >>

(b) CONFORMING AMENDMENT.—The analysis for such chapter is amended by adding at the end the following:

"44940. Security service fee.".

(c) SPECIFIC AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—Part C of subtitle VII of title 49, United States Code, is amended by adding at the end the following:

* * * *

FILED
OCT 29 2008

No. 08-198

In the Supreme Court of the United States

HUNTLEIGH USA CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner had contracts with various airlines to provide security screening for passengers and baggage on commercial airplanes. After the September 11, 2001, attacks, Congress passed legislation assigning to the federal government the responsibility to provide such security. One airline cancelled its services contract with petitioner, while others allowed their contracts to expire. The question presented is as follows:

Whether the statutory directive that federal officials assume responsibility for the performance of airport security screening effected a compensable taking of petitioner's property.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Babbit v. *Youpee*, 519 U.S. 234 (1997) 13
Cardinal Chem. Co. v. *Morton Int'l*, 508 U.S. 83 (1993) 12
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 9
Chicago, Burlington & Quincy R.R. v. *Chicago*, 166 U.S. 226 (1897) 13
Cienega Gardens v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003) 10, 11
Concrete Pipe & Prods. of Cal., Inc. v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) 13
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 13
Festo Corp. v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002) 12
First English Evangelical Lutheran Church v. *County of Los Angeles*, 482 U.S. 304 (1987) 13
Goldblatt v. *Town of Hempstead*, 369 U.S. 590 (1962) ... 13
Kimball Laundry Co. v. *United States*, 338 U.S. 1 (1949) 9, 10
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 7, 13

Cases—Continued: Page

Massie v. *United States*, 226 F.3d 1318 (Fed. Cir. 2000) 13
Monongahela Navigation Co. v. *United States*, 148 U.S. 312 (1893) 8, 9
Omnia Commercial Co. v. *United States*, 261 U.S. 502 (1923) ..... *passim*
Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001) 13
Penn Cent. Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 7, 13
Tahoe-Sierra Pres. Council, Inc. v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) 10, 13
United States v. *King*, 395 U.S. 1 (1969) 13
Warner-Jenkinson Co. v. *Hilton Davis Chem. Co.*, 520 U.S. 17 (1997) 12
Wisniewski v. *United States*, 353 U.S. 901 (1957) 12

Constitution, statutes and rules:

U.S. Const. Amend. V 3, 6, 9
Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 2
§ 101(g)(1), 115 Stat. 603 ..... 2, 12
National Housing Act, 12 U.S.C. 1701 *et seq.* 10
28 U.S.C. 1294(1) 13
28 U.S.C. 1295(a)(1) 12
28 U.S.C. 1295(a)(4) 12
28 U.S.C. 1345 13
40 U.S.C. 3113 (Supp. V 2005) 13
49 U.S.C. 114(a) (Supp. V 2005) 2

Statutes and rules—Continued: Page

49 U.S.C. 114(d) (Supp. V 2005) 2
49 U.S.C. 44901(a) (2000) (amended 2001) 2
Fed. R. App. P.:
Rule 35(a)(1) 12
Rule 35(b)(1)(A) 12
Fed. R. Civ. P. 71.1 13

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No. 08-198

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 525 F.3d 1370. Three opinions of the Court of Federal Claims (Pet. App. 30a-46a, 50a-56a, and 57a-85a) are reported at 75 Fed. Cl. 642, 65 Fed. Cl. 178, and 63 Fed. Cl. 440. Another opinion of the Court of Federal Claims (Pet. App. 47a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2008. The petition for a writ of certiorari was filed on August 13, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between 1974 and late 2001, federal law required commercial airlines to ensure that "all passengers and property that will be carried in a cabin of an aircraft in air transportation or intrastate air transportation" were subjected to security screening. 49 U.S.C. 44901(a) (2000) (amended 2001); Pet. App. 4a-5a. Most airlines complied with that requirement by hiring private security contractors to perform the required screening. Pet. 4; Pet. App. 4a.

In the wake of the September 11, 2001, attacks—which were perpetrated by hijackers who had passed through airport security—Congress determined that the responsibility for aviation security should no longer be assigned to the airlines. The Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, created a new federal agency, the Transportation Security Administration (TSA), to provide screening services at the Nation's commercial airports. See 49 U.S.C. 114(a) (Supp. V 2005); Pet. App. 5a. Under the new statute, the Under Secretary of Transportation for Security is "responsible for security in all modes of transportation." 49 U.S.C. 114(d) (Supp. V 2005). Congress specified that the Under Secretary was to "assume civil aviation security functions and responsibilities" no later than three months after ATSA's November 19, 2001 enactment. ATSA § 101(g)(1), 115 Stat. 603.

2. Petitioner began offering passenger-screening services to airlines in 1989, and baggage-screening services in 1999, primarily under contracts that could be terminated by the airlines without cause upon 30, 60, or 90 days' notice. Pet. App. 4a, 8a, 37a. When ATSA was enacted, petitioner had contracts to provide screening for "approximately 75 airlines" at "some 35 airports

across the United States." *Id.* at 4a. After ATSA, one airline terminated its contract with petitioner, and the others allowed their contracts with petitioner to expire pursuant to their terms. *Id.* at 8a.

3. On November 14, 2003, petitioner filed this suit in the United States Court of Federal Claims. Pet. App. 61a. Petitioner alleged that ATSA's transfer of responsibility for security screening from airlines to the government resulted in a taking of its property without just compensation in violation of the Fifth Amendment. *Id.* at 7a, 30a-31a. More specifically, it alleged that the government had effectively appropriated petitioner's contracts by assuming responsibility for the performance of the functions that petitioner had previously performed. *Id.* at 7a. Petitioner also argued that the government had effected a taking by destroying the goodwill and going-concern value associated with its business. *Id.* at 8a, 31a.

After a trial, the Court of Federal Claims rejected petitioner's takings claim. Pet. App. 30a-39a. It held that, "[w]ith regard to [petitioner's] screening contracts, the government's actions amount, at most, to frustration of purpose rather than a taking." *Id.* at 37a. It also rejected petitioner's claims based upon the goodwill and going-concern value of its business, explaining that the government had not taken the "underlying property" with which the goodwill and going-concern value were associated. *Id.* at 39a.

4. The court of appeals affirmed. Pet. App. 1a-29a. The court noted petitioner's concession that the government had not actually assumed its contracts with the airlines. *Id.* at 16a. The court explained that, in light of that concession, petitioner's "argument must be that ATSA rendered the contracts and the going concern

value and goodwill associated with [petitioner's] security screening business worthless." *Ibid.*

The court of appeals analogized petitioner's claim to that of the plaintiff in *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923) (*Omnia*), whose lucrative contract came to an end when the government requisitioned the steel that was the subject of the agreement. Pet. App. 17a-18a, 20a. The Court in *Omnia* held that no Fifth Amendment taking had occurred. See 261 U.S. at 511. In this case, the court of appeals noted that ATSA does not regulate petitioner directly, but instead modifies the prior scheme of airline regulation by shifting to a new entity the responsibility for screening passengers and baggage. Pet. App. 20a. Any losses that petitioner suffered were an indirect result of ATSA's elimination of the airlines' security-screening responsibilities. *Ibid.* Under *Omnia*, the court of appeals explained, such frustration of petitioner's expectations does not effect a cognizable taking. *Ibid.*

The court of appeals further held that its reasoning applied not only to petitioner's claims concerning the alleged taking of its contracts, but also to its claims based upon going-concern value and goodwill. Pet. App. 24a n.3. The court explained that those property interests, like petitioner's contract-based claim, had been merely "frustrated" but not "taken" by the actions of the government. *Ibid.*[1]

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[1] Petitioner's complaint also alleged that ATSA itself required the government to compensate petitioner. That statutory claim was rejected by both the trial court (Pet. App. 40a-46a) and the court of appeals (*id.* at 24a-28a), and petitioner does not pursue it in this Court.

ARGUMENT

The court of appeals correctly held that the government did not effect a taking of petitioner's contractual rights when Congress shifted responsibility for airline passenger and baggage screening to a new governmental entity. That decision does not conflict with any decision of this Court, of another court of appeals, or of a state court of last resort. Further review is not warranted.

1. Petitioner's chief contention (Pet. 16-19) is that the court of appeals' decision "[c]ontravenes [t]he [r]easoning" of *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923). In fact, the court of appeals correctly applied *Omnia*. In that case, the plaintiff had a contractual right to buy a large quantity of steel plate at a below-market price, but the government requisitioned all of the seller's steel production and affirmatively directed it not to fulfill its contract with the plaintiff. *Id.* at 507. The frustrated buyer sued, alleging that the government had caused the buyer to incur large losses and had thereby effected a taking. *Id.* at 508. This Court affirmed the dismissal of that claim.

The Court first explained that, although a contract is "property" within the meaning of the Fifth Amendment, "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense. * * * There are many laws and governmental operations which injuriously affect the value of or destroy property * * * but for which no remedy is afforded." *Omnia*, 261 U.S. at 508-509. The Court stated that "the law affords no remedy" for "consequential loss or injury resulting from lawful governmental action." *Id.* at 510.

Applying that principle in the context of a contractual transaction, this Court held that, if "a contract or

other property is *taken* for public use, the Government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." *Omnia*, 261 U.S. at 510. The Court acknowledged the plaintiff's claim that the steel was so closely identified with the contract "that the taking of the former, *ipso facto*, took the latter." *Ibid.* But the Court refused to "confound the contract with its subject-matter." *Ibid.* The Court explained that the "essence" of the executory contract was the exchange of promises in which each party came under an obligation and acquired a reciprocal right to enforce the obligation. *Ibid.* The government, however, had not acquired "the [contractual] obligation or the right to enforce it." *Id.* at 511. Thus, if the seller had failed to provide the steel, the government would have had no right to enforce the plaintiff's contract; and if the government had not paid for the steel, the seller's remedy would not have been enforcement of the contract. *Ibid.* As a result, the Court rejected the buyer's taking claim, concluding that "[f]rustration and appropriation are essentially different things," and that only the latter is compensable under the Fifth Amendment. *Id.* at 513.

With the minor distinction that the executory contract in *Omnia* involved the sale of a good, whereas petitioner's executory contracts involved the sale of services, the two cases are materially similar. In both cases, the government's actions caused contracts to come to an end, but the government did not appropriate those contracts. Rather, in each case, the government merely frustrated the plaintiff's business expectations.

Petitioner concedes that *Omnia* forecloses takings claims for "consequential losses" (Pet. 18), but it contends that its own interests were "more direct[ly]" affected (Pet. 19) than those of the frustrated steel buyer

in *Omnia*. See also Pet. 14 (arguing that Omnia's interests were "remotely impacted" by the actions of the government, while petitioner's own interests were "the avowed targets of the regulatory taking"). The court of appeals correctly rejected that argument, explaining that "the government's actions [in *Omnia*] were directed squarely at the contractual relationship that existed between" the steel seller and the steel buyer. Pet. App. 20a. Indeed, whereas the government obtained the steel in *Omnia* by expressly "direct[ing]" the seller "not to comply with the terms of [the buyer's] contract," 261 U.S. at 507, the government's actions in this case were not expressly directed at the contracts of petitioner or any other screening contractor. They were instead directed at the "subject-matter" (*id.* at 510) of those contracts: aviation security screening.[2]

As the court of appeals also correctly held (Pet. App. 20a), although ATSA undoubtedly frustrated petitioner's business expectations by changing the regulations applicable to the airlines, it did not regulate petitioner directly. The business that petitioner enjoyed before ATSA's enactment was an indirect consequence of the extant regulatory framework, in which most airlines

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[2] Because ATSA does not directly regulate petitioner's conduct, petitioner's reliance (Pet. 17) on *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), is misplaced. Those cases involved government-imposed restrictions on private parties' development *of their own land*. For similar reasons, petitioner's characterization of ATSA as "nationaliz[ing] an entire private industry" (Pet. 28) is overwrought. Although ATSA assigns to a new federal agency the security-screening responsibilities that were previously performed by petitioner and similar private contractors, the federal government has neither appropriated petitioner's tangible assets nor assumed petitioner's rights and obligations under pre-existing contracts.

chose to fulfill their security-screening responsibilities by retaining contractors like petitioner. Pet. 4; Pet. App. 4a. That legal backdrop, however, was always subject to change. *Id.* at 35a. ATSA did not cause the TSA to appropriate any of petitioner's contracts. Rather, Congress simply relieved the airlines of the security responsibilities it had previously imposed on them, thereby frustrating petitioner's business expectations by eliminating the airlines' demand for its services. *Id.* at 20a. As in *Omnia*, that frustration of business expectations did not effect a taking.[3]

Petitioner also contends that the Court in *Omnia* "acknowledged" an exception for "cases where the contract at issue is 'an integral part of' the property taken." Pet. 18 (quoting *Omnia*, 261 U.S. at 513) (citing *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 329 (1893)). That purported exception, however, has no application to petitioner's suit. The underlying case, *Monongahela Navigation Co.*, involved an undisputed physical taking of "a lock and dam." *Omnia*, 261 U.S. at 513. The contract right mentioned in *Omnia* was the accompanying "franchise to exact tolls," which was relevant to determining the "value" of the "lock and dam" that had been taken—not to the question of whether there had been a taking. *Ibid.*; see *Monongahela Navi-*

[3] Petitioner suggests (Pet. 19) that this case is distinguishable from *Omnia* because it occurred on a greater scale—*i.e.*, because ATSA "was specifically designed to nationalize the entire baggage screening industry." In fact, the *Omnia* Court acknowledged that the steel contract at issue was only one of "an appalling number of existing contracts" related to industrial production that the government had taken over as part of the war effort. 261 U.S. at 513. The Court found, however, that the broad scope of the government's procurement measures did not change the "essential[] differen[ce]" between "[f]rustration and appropriation." *Ibid.*

gation Co., 148 U.S. at 328-329 (concluding that "just compensation for this lock and dam" corresponds to "the whole value" of the property, which "depends largely upon * * * the franchise to take tolls"). Thus, the exception petitioner infers from *Omnia* is irrelevant to the present case, where the issue is whether the government has taken property for purposes of the Fifth Amendment.

2. Petitioner contends (Pet. 19-21) that the court of appeals' passing reference (Pet. App. 24a n.3) to *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), provides an independent basis for this Court's review. The court of appeals explained that its analysis of petitioner's contractual rights applied equally to petitioner's claims based on deprivation of going-concern value and goodwill because "those property interests, like [petitioner's] contracts, were merely 'frustrated' by the government's enactment of ATSA. They were not taken." Pet. App. 24a n.3. In the sentence petitioner finds objectionable, however, the court noted that in certain prior cases going-concern value "ha[d] been held to be compensable in the context of a temporary, but not a permanent, taking." *Ibid.* (citing, *inter alia*, *Kimball Laundry Co.*, 338 U.S. at 15).

Petitioner asserts (Pet. 21) that the court of appeals' reference to petitioner's going-concern and goodwill interests has incorrectly "limit[ed] the compensation due to claimants whose property has been permanently taken." But because the court of appeals expressly concluded that there had been no taking here (whether temporary or permanent), anything that could be inferred about its views on the amount of "compensation due" in permanent-taking cases would necessarily be dictum and unworthy of review. See *Chevron U.S.A. Inc.* v.

NRDC, 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions").[4]

3. Petitioner contends (Pet. 22-26) that the Federal Circuit's ruling conflicts with that court's earlier decision in *Cienega Gardens* v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003). That claim is unfounded and provides no sound basis for this Court's review.

a. *Cienega Gardens* involved low-income housing programs under the National Housing Act, 12 U.S.C. 1701 *et seq.* See 331 F.3d at 1325. In those programs, the Department of Housing and Urban Development (HUD) provided real-estate developers with mortgage insurance that facilitated low-interest, 40-year mortgages on properties they owned. *Ibid.* In return, HUD and the owners entered into regulatory agreements that required the properties to be used for low-income housing projects regulated by HUD for as long as the mortgage insurance remained in effect, but allowed the owners to leave the program after 20 years by prepaying the remaining debt on their mortgages. *Ibid.* When the 20-

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[4] Although petitioner correctly notes (Pet. 20) that *Kimball Laundry Co.* acknowledged some permanent takings in which going-concern value could be compensable, see 338 U.S. at 12 (referring to instances where "public-utility property has been taken over for continued operation by a governmental authority"), petitioner elides the fact that those circumstances involved a *physical* taking, see *id.* at 12-13 (referring to "the condemned facilities" of a public utility operated by the government). By contrast, petitioner alleges a regulatory taking. As the Court explained in *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), it is often "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Id.* at 323 (footnote omitted). Petitioner cites no cases dealing with goodwill or going-concern value in the context of a permanent regulatory taking.

year mark approached, Congress grew concerned that many owners would exercise their prepayment option and reduce the stock of federally assisted low-income housing. *Id.* at 1326. Congress therefore enacted two statutes that effectively prevented the owners from leaving the program for several years. *Id.* at 1326-1327. Numerous owners filed suit, contending that the government had effected a regulatory taking by abrogating their right to prepay the mortgages. *Id.* at 1323-1324.

The Federal Circuit ruled in the owners' favor, explaining that it found the facts of *Omnia* distinguishable from the circumstances before it. In *Omnia*, this Court explained that "the effect of the [government's] requisition [of steel] was to bring the contract to an end, not to keep it alive for the use of the Government." 261 U.S. at 513. In *Cienega Gardens*, by contrast, the Federal Circuit concluded that the government *had* kept the plaintiffs' contracts alive for its own use by preventing the plaintiffs from prepaying their mortgages (as the original agreements would have allowed). 331 F.3d at 1335. And, unlike its actions in *Omnia*, the government had done so by altering "the contract rights themselves" (*i.e.*, the "clear, unqualified contract right[]" to prepay a mortgage after 20 years), rather than by acquiring "the subject matter of the contract." *Id.* at 1333, 1334, 1335 & n.29.

The Federal Circuit's reasoning in *Cienega Gardens* is inapposite here. Petitioner could not plausibly contend that the government kept petitioner's contracts with the airlines alive for its own use. Indeed, petitioner's entire case is built upon the termination (or expiration without renewal) of those contracts. Moreover, the government here dealt with the subject matter of petitioner's contracts ("civil aviation security functions

and responsibilities," ATSA § 101(g)(1), 115 Stat. 603), and it did not alter any of the terms of those agreements. In light of those factors, the court of appeals correctly held that the governmental conduct alleged to effect a taking in this case is analogous to the federal requisition of steel in *Omnia* rather than to the alteration of contractual terms in *Cienega Gardens*. See Pet. App. 20a-21a, 22a-23a.

b. Even if there were inconsistencies between the decision below and *Cienega Gardens*, such an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).[5] Petitioner attempts to evade that principle by asserting (Pet. 21) that a conflict within the Federal Circuit is "tantamount to a conflict within the circuits." But petitioner cites only patent-law cases to support that proposition. Pet. 22 (citing *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002); *Warner-Jenkinson Co.* v. *Hilton Davis Chem. Co.*, 520 U.S. 17 (1997); *Cardinal Chem. Co.* v. *Morton Int'l*, 508 U.S. 83 (1993)). Of course, the Federal Circuit has exclusive appellate jurisdiction over those cases. See 28 U.S.C. 1295(a)(1) and (4).

Petitioner is mistaken, however, in claiming (Pet. 22) that the Federal Circuit has "virtually complete jurisdiction over Fifth Amendment takings cases." Even in takings suits against federal entities, the Federal Circuit does not have exclusive jurisdiction. In some circumstances, equitable relief might be appropriate to prevent the operation of a federal statute that allegedly amounts to a taking. Because the Court of Federal

[5] Despite its current claim of a conflict between Federal Circuit decisions, petitioner did not file a petition for rehearing en banc in this case. See Fed. R. App. P. 35(a)(1) and (b)(1)(A).

Claims cannot grant such relief, see *United States* v. *King*, 395 U.S. 1, 5 (1969); *Massie* v. *United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000), such a claim would need to be pursued in a federal district court. Accordingly, this Court has adjudicated takings challenges to federal statutes in reviewing decisions of the regional courts of appeals. See, *e.g.*, *Eastern Enters.* v. *Apfel*, 524 U.S. 498 (1998) (reviewing First Circuit decision); *Babbitt* v. *Youpee*, 519 U.S. 234 (1997) (reviewing Ninth Circuit decision); *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (reviewing Ninth Circuit decision).[6]

Moreover, takings claims may also be brought against state and local governments, see *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 241 (1897), and takings suits against non-federal entities are frequently decided by state courts and by federal courts of appeals other than the Federal Circuit. This Court regularly decides takings issues on review of such decisions. Indeed, many of the cases that petitioner cites fall within that category. See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992); *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987); *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). Because petitioner has identified no conflict between the

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[6] In addition, when the United States initiates a physical taking, it files a condemnation proceeding in federal district court, see 40 U.S.C. 3113 (Supp. V 2005); 28 U.S.C. 1345; Fed. R. Civ. P. 71.1, and the district court's judgment is subject to review by the relevant regional court of appeal, see 28 U.S.C. 1294(1).

decision in this case and any decision from another federal court of appeals or a state court of last resort, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-198

IN THE
Supreme Court of the United States

HUNTLEIGH USA CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner Huntleigh USA Corporation is wholly owned subsidiary of ICTS International N.V., a publicly-held limited liability company whose shares are traded on the NASDAQ.

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.6 ... i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

1. The Federal Circuit's Extension of *Omnia*'s "Frustration" Rule to This Case is Erroneous. 3

2. The Federal Circuit's Decision Below Stands in Direct Contradiction to Its Decision in *Cienega Gardens*. 6

3. The Federal Circuit's Unprecedented—And Erroneous—Interpretation of this Court's Decision in *Kimball Laundry* Independently Warrants Granting the Petition. 8

4. The Intra-Circuit Conflict Warrants This Court's Review. 10

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES

Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206 (Fed. Cir. 2005) 5

Cienega Gardens v. United States, 331 F.3d 1319 (Fed. Cir. 2003) 2, 6, 7

Clinch v. Heartland Health, 187 S.W.3d 10 (Mo. Ct. App. 2006) 7

Downey v. United Weatherproofing, 253 S.W.2d 976 (Mo. 1953) 7

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 11

In re Fifth Avenue Coach Lines, 46 Misc.2d 14, 259 N.Y.S.2d 313 (Sup. Ct. N.Y. Co. 1964) ... 9

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) 8, 9

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 6

MacDonald, Sommer, & Frates v. Yolo County, 477 U.S. 340 (1986) 8

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 9

Cited Authorities

Page

Murphy v. New Milford Zoning Commission, 402 F.3d 342 (2d Cir. 2005) 11

Omnia Commercial Co. v. United States, 261 U.S. 502 (1923) ..... *passim*

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 6-7, 9

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 7

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 7, 10

United States v. Hohri, 482 U.S. 64 (1987) 11

UNITED STATES CONSTITUTION

Fifth Amendment 2, 8, 10, 11

STATUTES

40 U.S.C. § 1331 12

28 U.S.C. § 1295(a)(3) 10

28 U.S.C. § 1491(a)(1) 10

Cited Authorities

Page

Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(g)(2), 115 Stat. 603 ..... 3, 5

RULE

Fed. R. Civ. P. 71.1 12

Through the ATSA legislation,[1] the Government nationalized Huntleigh's passenger and baggage screening business. In doing so, it stepped into Huntleigh's shoes, hired its own screeners (many of them former Huntleigh employees), and started charging airlines a fee for screening services—just as Huntleigh had before the enactment of ATSA. The Government did all of this under the auspices of a statute that was designed to replace private screeners with Government employees and is *directly targeted* at private screening contracts (*i.e.*, it expressly makes it unlawful for a private company like Huntleigh to perform screening services at U.S. airports pursuant to contracts). There is no *bona fide* question that, as a direct result of the Government's nationalization of airport screening, Huntleigh lost its valuable contracts, the going-concern value of its business, and the goodwill it had built up over many years. Yet the Government in its Brief in Opposition ("BIO") insists Huntleigh is owed nothing—that the extinguishment of its property interests is really merely the indirect byproduct of "regulation" directed at airlines, and thus not a "taking" at all. The Government's position, like the Federal Circuit's below, is completely divorced from reality, rides roughshod over the text and purpose of ATSA, perverts this Court's precedent, and eviscerates the Fifth Amendment's protection of private property rights.

The Federal Circuit not only ignored ATSA's plain terms, but also misconstrued *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), transmogrifying it

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[1] All acronyms and abbreviations used herein are defined in Huntleigh's Petition for Certiorari ("Petition").

into a blanket authorization for the Government to nationalize businesses and extinguish contract rights without paying just compensation, so long as it refrains from crossing out right-holders' names on extant contracts and replacing them with its own. The Federal Circuit's unprecedented and erroneous expansion of the limitations imposed on private property owners' Fifth Amendment claims by the *Omnia* "frustration" rule in the case at bar cries out for this Court's review. After all, there is no doubt that if the Government had written "TSA" over Huntleigh's name on the screening contracts with the airlines, compensation would be due. It cannot be the law that the private property rights protected by the Fifth Amendment can be so easily circumvented by a clever transaction form or depend on such technical formalities. Just five years ago, the Federal Circuit *itself* rejected such a strained construction of the Just Compensation Clause, explaining that "the abrogation by legislation of clear, unqualified contract rights requires a remedy, even in a highly regulated industry," and that, accordingly, "legislation aimed at . . . contract rights themselves in order to nullify them" effects a compensable taking. *Cienega Gardens v. United States*, 331 F.3d 1319, 1334, 1335 (Fed. Cir. 2003).

The questions presented in the Petition are extremely important ones that bear on the scope of the Government's responsibility when it implements legislation with the avowed purpose and undeniable effect of nationalizing a private industry. The Federal Circuit's inconsistent rulings in the takings area offer no clear guidance, and, contrary to the Government's assertions in its BIO, opportunities for other courts of

appeal and state courts to clarify the law on the questions presented are rare at best. The decision below will no doubt generate special mischief and concern as the current financial crisis ripens, and along with it the Government's expanding acquisitions of private business interests. With the United States acquiring huge stakes in private financial institutions and exploring new ways to secure the banking industry, the need to identify the line between a compensable taking and a mere frustration of business expectations will no doubt become all the more pressing. The Petition should be granted.

1. The Federal Circuit's Extension of *Omnia*'s "Frustration" Rule to This Case is Erroneous.

The Federal Circuit rejected Huntleigh's takings claim because, in its view, Huntleigh's losses of its contracts, going-concern value, and goodwill were merely "indirect" effects of ATSA. (Pet. App. 20a.) The court reached that conclusion even though ATSA expressly targets "air carrier . . . contract[s] for provision of passenger screening services at airports in the United States," ATSA § 101(g)(2), 115 Stat. at 603 (Pet. App. 106a), and makes it unlawful for a private company to perform under existing screening contracts. The Government's efforts to defend the Federal Circuit's holding only highlight the jurisprudential havoc that will likely result from that holding.

Tracking the Federal Circuit's reasoning below, the Government essentially argues that the *Omnia* rule bars takings claims in every case where the Government has avoided executing a formal novation of the private

contract alleged to have been taken. (*See* BIO at 6.) This is a distortion of the *Omnia* ruling, which, properly read, simply precludes remote claimants from suing the Government for a taking. In sharp contrast to this case, *Omnia* involved a claim for classic consequential damages flowing from the *taking of a third party's property*. In *Omnia*, the United States took steel belonging to a steel producer. *See Omnia*, 261 U.S. at 502. That taking made it impossible for the steel producer, in turn, to supply the appropriated steel to a manufacturer that had agreed to purchase it. *See id.* It bears emphasis that the plaintiff in *Omnia* was *not* the steel producer, the direct target of the Government's taking (like Petitioner here), but was an the entity down the chain that was forced, as a consequence of the Government's action, to look elsewhere for replacement goods. On those facts, this Court held that the manufacturer could not assert a viable takings claim because its only losses were "consequential" to the primary taking. *Id.* at 510. The manufacturer's contract with the steel producer was not "taken," but merely was frustrated by the taking of *the steel producer's property*. *Id.*

To the extent this case can be analogized to *Omnia* at all, Huntleigh is equivalent to the steel producer—the primary (indeed, the only) the target of the taking. Huntleigh is the entity that suffered the only direct loss at the hands of the Government. And, as the Court in *Omnia* made clear, the primary target of the taking *is* entitled to compensation: "If the government had failed to pay for what it got, what would have been the right of the steel company? . . . *[T]he just compensation guaranteed by the Constitution.*" *Id.* at 511 (emphasis

added). In relying on this passage for its own argument, the Government conveniently omits reference to the last—and key—sentence. (*See* BIO at 6.)

To try to escape this conclusion here, the Federal Circuit and the Government have manufactured an obstacle to Huntleigh's claim: They insist that ATSA "regulate[s]" the airlines and not Huntleigh (Pet. App. 20a; BIO at 7-8), and they argue that this is fatal to Huntleigh's claim. The argument is wrong on two levels. First, it contravenes the explicit terms of ATSA, which clearly acknowledges the Government's intention to replace private "passenger screening services" with Government services, ATSA § 101(g), 15 Stat. at 603 (Pet. App. 106a), and, second, it erroneously assumes that a party must be the *only* target of a regulation in order to bring a valid takings claim. To be sure, the airlines themselves were regulated by ATSA. But private screening companies *also* were directly regulated by ATSA, and they are the primary target of the sole *takings* effected thereby. That is precisely why this case differs so dramatically from *Omnia* and *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005), another inapposite case relied up on by the Federal Circuit. (*See* Pet. App. 16a.) In both of those cases, another party had suffered a taking upon which the plaintiff sought to piggyback. In *Omnia*, the manufacturer sought to piggyback upon the taking of the steel producer's property. In *Air Pegasus*, the lessee of the heliport sought to piggyback upon the purported taking of the helicopter operators' property. *See Air Pegasus*, 424 F.3d at 1215. Here, Huntleigh seeks compensation for property taken directly from *it*—its security contracts, going-concern value, and goodwill.

It is not seeking to piggyback on anyone. The Government nationalized *Huntleigh's* business. In attempting to wield *Omnia* as a shield against Huntleigh's claim, the Federal Circuit unjustifiably and vastly expanded the scope of this Court's holding in that 85 year old case.

2. The Federal Circuit's Decision Below Stands in Direct Contradiction to Its Decision in *Cienega Gardens*.

The Government fails in its effort to reconcile the Federal Circuit's decisions in this case and in *Cienega Gardens*, 331 F.3d 1319. (*See* BIO at 10-12.) The court in *Cienega Gardens* held that a takings claim was stated where Congress eliminated a contractual right to prepay a mortgage after 20 years—a right that was contained in a *private contract* between the mortgage-holders and their banks, not, as the Federal Circuit erroneously suggested, in any "contract with the federal government" (Pet. App. 23a). *See Cienega Gardens*, 331 F.3d at 1334-36. In reaching that conclusion, the Federal Circuit drew a distinction between "legislation targeted at some public benefit, which incidentally affects contract rights," and the situation presented here, where a valid takings claim would exist: "legislation aimed at the contract rights themselves in order to nullify them." *Id.* at 1335.

On its face, ATSA plainly falls into the latter category and, therefore, effected a compensable taking under the well-established analyses of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104

(1978). In both this case and *Cienega Gardens*, the claimants' contractual rights (in *Cienega Gardens*, the right to pre-payment; here, *all* of Huntleigh's rights under its private contracts with the airlines) were swept away by legislation "aimed at [those] contract rights." Here, as in *Cienega Gardens*, a cognizable takings claim has been established.[2]

Indeed, that is exactly the conclusion the Court of Federal Claims first reached in this case. Before inexplicably reversing course, the trial court here correctly held that this case was controlled by *Cienega Gardens* and went so far as to conclude that: "The present case is even more egregious. More than rewriting the contracts between Huntleigh and the nation's airlines, the government has taken over Huntleigh's position as the contractor, and has created

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[2] Although the point has no bearing on the analysis, and was not addressed by the Federal Circuit, the Government insinuates that it did not actually take anything of value because many of Huntleigh's contracts "could be terminated without cause upon 30, 60, or 90 days' notice." (BIO at 2.) It is well-established, however, that intangible property rights are defined by the law of the state in which the plaintiff is domiciled. *See, e.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (applying Texas law to determine whether interest on funds located in Texas banks was compensable "property"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 999, 1001-04 (1984) (applying Missouri law where company alleging taking of intangible property was headquartered in Missouri). Missouri—which is Huntleigh's domicile—treats terminable contracts (even those terminable *at will*) as "property." *See, e.g., Downey v. United Weatherproofing*, 253 S.W.2d 976, 980 (Mo. 1953); *Clinch v. Heartland Health*, 187 S.W.3d 10, 15 (Mo. Ct. App. 2006).

for itself a sweeping monopoly." (Pet. App. 73a-74a.) On that unassailable reasoning, the Federal Circuit should have sustained Huntleigh's Fifth Amendment claim.

3. The Federal Circuit's Unprecedented—And Erroneous—Interpretation of this Court's Decision in *Kimball Laundry* Independently Warrants Granting the Petition.

The Federal Circuit below compounded its distortion of *Omnia* by applying a flawed "frustration" analysis not just to Huntleigh's claim for the taking of its contracts, but also to Huntleigh's claims for the taking of the going-concern value and goodwill of its business. (Pet. App. 24a n.3.) Then, as an alternative basis for barring recovery of just compensation for going-concern value and goodwill, the Federal Circuit held that a plaintiff cannot bring a takings claim for "going concern value" unless the alleged taking was "temporary" and not "permanent." (*Id.*) Contrary to the Government's assertion, this latter holding cannot be properly characterized as "dictum" (BIO at 9) because the court offered it as an independently sufficient basis for its holding. *See, e.g.*, *MacDonald, Sommer, & Frates v. Yolo County*, 477 U.S. 340, 345 n.4 (1986) (explaining that alternative holdings are not "dicta").

The holding is plainly untenable in light of this Court's established precedent. (*See* Petition at 19-21.) In fact, the Government does not contend otherwise. (*See* BIO at 9-10.)[3] Instead, the Government suggests—

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[3] The Government, quoting the Petition, suggests that Huntleigh is seeking to argue a point not reached by the (Cont'd)

without actually arguing—that the reasoning in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), does not necessarily translate from the physical takings context to the regulatory one. (*See* BIO at 10 n.4.) But while regulatory takings analysis differs in some respects from the analysis applicable to physical takings (for example, it often entails a balancing of public and private interests, *see Penn Cent. Transp. Co.*, 438 U.S. at 123-128), neither the Government nor the Federal Circuit has offered any reason why going-concern value and goodwill should be recognized as compensable property interests in the physical takings but not the regulatory takings context. The fallacy of the suggested distinction is illustrated by a slight variation on this case: If Huntleigh here had pursued a claim against the Government for the taking of physical assets—an office building, security equipment and/or employee uniforms, for example—without compensation, it would be entitled to claim compensation for those physical assets as well as for the other property interests taken (contracts, going-concern value, and goodwill).[4] In fact, Huntleigh

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(Cont'd)

Federal Circuit's decision: the valuation of the property taken. (*See* BIO at 9.) That is incorrect. What Huntleigh argued in its Petition was that, with its alternative holdings, the Federal Circuit erected two independent barriers to recovery of just compensation in the circumstances presented: (1) a "frustration" test purportedly based on *Omnia*; and, additionally, (2) a requirement that the intangible property rights of going-concern value and goodwill have been temporarily, rather than permanently, taken. (*See* Petition at 19-21.)

[4] For analogous examples, see *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893) and *In re Fifth Avenue Coach Lines*, 46 Misc.2d 14, 259 N.Y.S.2d 313 (Sup. Ct. N.Y. Co. 1964).

initially included within its takings claim certain physical assets, but declined to pursue that portion of the claim in light of the physical assets' *de minimus* value. There is no conceivable reason that Petitioner should be deprived of its substantive rights concerning its intangible private property rights merely because the value of the physical property taken by the Government had negligible value.

4. The Intra-Circuit Conflict Warrants This Court's Review.

Without question, the Court of Federal Claims and the Federal Circuit reviewing its decisions have exclusive jurisdiction over claims for just compensation under the Takings Clause of the Fifth Amendment against the Federal Government. *See* 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1295(a)(3). The Government's argument that claims for *injunctive* relief against the United States and takings claims against states may be adjudicated outside the Court of Federal Claims and the Federal Circuit overstates the breadth of the exceptions to the general rule and thus furnishes no valid reason to discount the gravity of split of authority within the Federal Circuit itself.

First, "[e]quitable relief [including injunctive relief] is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). In other words, plaintiffs who have available to them claims under the Tucker Act simply cannot seek injunctive relief; they must instead proceed to the Court of Federal Claims

after the taking has occurred. Only in those rare cases where Tucker Act relief is not even theoretically available can injunctive relief be sought in the first instance under the Fifth Amendment's Just Compensation Clause. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 520-21 (1998) (outlining narrow exception). As this Court has recognized, Congress has ensured that circumstances where the Federal Circuit does not have jurisdiction to review claims against the federal government are necessarily rare, because "[a] motivating concern of Congress in creating the Federal Circuit was the special need for *nationwide uniformity in certain areas of the law*. . . . Nontort claims against the Federal Government present one of the principal areas in which Congress sought such uniformity." *United States v. Hohri*, 482 U.S. 64, 71-72 (1987) (quotation omitted) (emphasis added).

Second, while it is conceivable that states might seek to take over entire industries within their borders or even extinguish private contract rights for the benefit of the public generally, the likelihood of such action at the state level is fairly remote—particularly in this modern era of federalization and preemption. In an apt illustration of the point, all of the cases the Government cites as examples of takings claims asserted against states and their agencies are cases involving land use, which traditionally is a matter of local concern, regulated at the state or local level. *See, e.g., Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005). (*See* BIO at 13.)[5]

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[5] The Government's observation that federal courts other than the Court of Federal Claims and the Federal Circuit can (Cont'd)

CONCLUSION

For the foregoing reasons, and those articulated in Huntleigh's Petition, Huntleigh respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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(Cont'd)
adjudicate eminent domain actions initiated by the United States pursuant to 40 U.S.C. § 1331 and Fed. R. Civ. P. 71.1 (*see* BIO at 13 n.6) likewise hardly demonstrates that those courts regularly are presented with the issues arising in *this* case, which involves the taking of contract and other intangible rights, not the taking of real property.